IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1897.

No. 431.

MICHAEL W. O'BRIEN, ET AL., EXECUTORS, ETC., OF THE LAST WILL OF FRANCIS PALMS, ET AL.,

vs.

JOHN G. WHEELOCK, ET AL.

MR. HENRY M. DUFFIELD,
MR. JOHN M. PALMER,
MR. JOHN MAYO PALMER,
Counsel for Appellant.

MR. H. S. GREEN,
MR. J. O. HUMPHRY,
MR. A. C. MATTHEWS,
MR. HARRY HIGBEE,
MR. THOMAS WORTHINGTON,
MR. A. G. CRAWFORD,
MR. JEFFERSON ORR,
Counsel for Appellee.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

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IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Michael W. O'Brien, Francis F. Palms and Clothilde Palms, executors of the last will and testament of Francis Palms, deceased, and Albert Blair.	In Chancery.
vs.	
John G. Wheelock, George W. Jones, John E. Adams and others.	

1 Pleas in the Circuit Court of the United States of America for the Southern District of Illinois held at the city of Springfield in said District before the Hon. William J. Allen, District Judge of said District, and in the absence of the Hon. William A. Woods, the Hon. James G. Jenkins and the Hon. John W. Showalter, Judges of the Seventh Judicial Circuit, on Wednesday the tenth day of February, at the January Term of said Court, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-first year. Placita.

Michael W. O'Brien, Francis F. Palms and Clothilde Palms, executors of the last will and testament of Francis Palms, deceased, and Albert Blair,
vs.
John G. Wheelock, George W. Jones, John E. Adams and others.
} In Chancery.

Be it remembered that heretofore, to-wit: on the twenty-second day of April, in the year of our Lord one thousand eight hundred and eighty-nine, came Michael W. O'Brien, Francis F. Palms and Clothilde Palms, executors of the last will and testament of Francis Palms, deceased, and Albert Blair, complainants, by Messrs. John M. and John Mayo Palmer, their solicitors, and Henry M.

Duffield, Esq., of counsel, and filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of Illinois, their original bill in the nature of a supplemental bill and bill of review against John G. Wheelock, George W. Jones, John E. Adams and others, defendants, as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS.

2 June Term, A. D. 1889.

To the Honorable, the Judges of the Circuit Court of the United States for the Southern District of Illinois, Sitting in Equity:

Your orators, Michael W. O'Brien, Francis F. Palms and Clothilde Palms, executors of the last will and testament of Francis Palms, deceased, and Albert Blair, by leave and authority heretofore granted, by the order and decree of this court as hereinafter shown, bring this their Original Bill, in the nature of a Supplemental Bill, and Bill of Review, against—

1 Bill amdmts 2. 22 '89

John G. Wheelock, Geo. W. Jones, John E. Adams, Marion Alford, Fred S. Alford, Buddle H. Atkinson, Harry B. Atkinson, Geo. M. Atkinson, Thomas J. Able, Clement V. Aylesworth, William L. Aaron, M. M. Aldrich, Jeremiah G. Adams, Henry L. Anderson, Eliza D. Anderson, Matthew Abrams, Joseph M. Allen, Edward H. Buckley, Ernst Brockmeier, John Brockmeier, Frank Beebe, Charles H. Bull, William B. Bull, George Baker, G. W. L. Baker, Samuel Brown, John Burkholder, Richard H. Baker, Charles Baker, E. T. Bridge, William H. Bridge, Olive B. Brakefield, R. T. Bratten, Julia A. Burchett, W. D. Bratten, S. G. Blivin, Harvey O. Bancroft, John W. Boyd, David Boyd, John H. Brammel, Martha A. Blair, Harrison Brown, Joseph Brown, Henry Bush, John W. Brammel, Charles H. Brown, John C. Brown, Daniel C. Bates, Boyd Levee Drainage District, Frank H. Brinkman, Cornelius Brinkman, Antie S. Brinkman, George Brinkman, Edward F. Binns, Isaac Barton, William T. Barton, John Burns, Edward Bybee, Fannie Bybee, P. F. Barton, Daniel T. Ball,
3 Milo M. Blake, James R. Berry, John F. Berry, Samuel Bunn, Norman Brown, William H. Beacom, Charles E. Brewster, Anna M. Brewster, Minerva M. Brewster, Carson W. Brewster, Enoch R. Chatten, E. A. Crandall, Martha A. Caldwell, William N. Caldwell, John L. Cupps, Frances L. Cupp, Samuel Clark, William A. Chandler, Sarah Chandler, William E. Churchill, Patrick H. Cashman, William C. Chandler, Alex. T. Chandler, Landy S.

Cory, Charles R. Churchill, Chester R. Churchill, Elmer Churchill, Maria Churchill, Ida Churchill, Almon J. Churchill, Anna M. Colton, Amanda Carter, John Clutch, Warren Clutch, Joseph C. Colvin, John W. Cannon, Daniel Caffrey, Sarah F. Colvin, Thos. Cochran, Mary Crews, Andrew Crews, Benjamin Camp, Orlando Camp, W. B. Curtis, Samuel Clemens, Sarah J. C. Clark, Mary E. Collins, A. G. Coley, Ason G. Chamberlain, John H. Duker, Theodore Duker, Thomas Davis, Mary A. Dean, James Demoins, Thomas Demoins, Joel L. Daud, Jesse Dutton, Silas Dutton, Albert Dutcher, Henry Dutcher, John N. Dewell, William Davis, Charles C. Dewell, A. M. Danely, Anna J. Dodge, Sarah A. Dutcher, Noble M. Dyke, Charles B. Dustin, Jeremiah Dempsey, Philip Donahoe, Joseph E. Dober, James M. Davis, Lucinda B. DeCamp, Wm. M. DeCamp, Jas. E. DeCamp, George M. DeCamp, Adelia DeCamp, Adeline DeCamp, Esther DeCamp, Tata DeCamp, Helen Dodge, John T. Emison, Clinton Dodge, Joseph Elliott, Wilson B. Elliott, James Emerson, John Emerson, Lucy A. Ellis, O. J. Edmonds, August Fiel, O. J. Ferguson, William S. Fleck, George Furgeson, Jesse Fiel, James Fisher, Louisa Ferguson, Newton Fleischlein, George Finley, John L. Freeman, George R. Fisher, Philip Fusselman, Albert H. Fishell, Irene M. Fesler, Charles W. Fleak, Nelson French, Alexander F. Ferguson, Jacob Flegle, Wiley A. Farmer, Edward B. Ferguson, Catherine Gunsett, Geo. Gunsett, John T. Gunsett, Maria H. E. Gunsett, John Henry Gunsett, Joseph B. Gilpin, William H. Govert, Adam Gruel, Jr., William Groh, Charles B. Gose, Ernst Gilhaus, Dennis Green, Letitia Green, Mary M. Grammar, August Gilhaus, James R. Grove, Christopher D. Greene, Samuel B. Gaines, Emily A. Gordon, Lewis Green, DeWitt Greene, William Gelvin, William H. Gorton, Ann Gard, Frank Gordon, John D. Gorton, Charles M. Gilmer, William H. Gay, James Gay, James C. Gay, Joseph J. Gano, Augustus L. Galloway, Mary E. Griffin, Ida E. Grimes, Maria A. Grabill, Eliza E. Harrington, Lewis H. Hull, Michael W. Hughes, Sophia Hull, John O. Hampton, Mary Hoskins, Herman Heidbreder, Lewis D. Hirsheimer, Samuel E. Hewes, Ozias M. Hatch, Mary M. Hull, Everett S. Hull, Mary C. Hull, George Hack, Nancy Hinds, Daniel Hack, Frederick Hack, Sarah E. Hornback, Henry Hoyle, James Hornback, Barnabas Hines, R. T. Hicks, Harry Higbee, R. W. Hart, Tyra A. Hayden, Mary E. Hayden, William H. Hyde, Virginia Hyde, Julia B. Hill, John B. Hill, Samuel Heavener, George Harvey, Werner Heidloff, Julia M. Higbee, Sue W. Higbee, Mary Hosford, Hepsey J. Hosford, Hilbert Hosford, Mary Hosford, James M. Henry, Elizabeth Halstead, G. H. Henry, Mary L. Horton, Aaron F. Hemphill,

Original Bill & Amendments filed Apr. 22

Bill Amendments Sep. '89

Alexander Hemphill, John Henry, William Henry, Marcia A. Henry, M. A. Henry, George Henry, Isaac A. Hoskins, George Hoskins, Sam'l H. Hogsett, Charles Hanson, Isabel Hogsett, Adam C. Hilton, Daniel D. Hicks, Henry Heidholt, James S. Irwin, Rosella Ives, Francis J. Jackson, George W. Jones, Frank H. Jones, Fred Jones, Eliza H. Jackson, Jesse F. Johns, Alice Jennings, Emma L. Jones, Andrew M. Journey, George M. James, Fred Kaiser, Robert King, Gabriel Kay, George H. Kenady, Emma Kennedy, Wm. H. Knodel, Dollie Kuchman, Nancy E. Kinder, George King, Edward Kendrick, Isabella Kendrick, Wiley P. Kennedy, Thomas Kendrick, Esther Kendrick, Samuel G. Kendrick, Mary J. Kendrick, Geo. Kile, Jr., G. W. Klitz, C. P. Klitz, Claus A. Luken, Junius C. Lewis, Eleanor Lewton, Julia Lyon, Wm. H. Lewis, Geo. C. Locke, John S. Lockwood, B. C. Lindsey, James Likes, Caroline Long, Mary Lyon, Mary Landrum, Elizabeth Lyon, Wm. Livingston, James F. Laurimore, Andrew S. Lovell, Martha Ladow, Mary Ladow, Eliza J. Lewis, Wm. P. Lovett, Clark F. Lovett, John S. Lovett, Emeline Long, Phoebe J. Long, William J. Long, Henry A. Long, George P. Long, John Miller, Henry C. Miller, Folkalena M. Miller, William Miller, Adam Miller, Mary Miller, Andrew Miller, Jr., Frederick Miller, Amalie Miller, Brice McCrory, Bernhard Miller, Susanna McTucker, James McTucker, Jessie McTucker, Eliza McTucker, Mary McTucker, John B. McTucker, Eilert Miller, H. H. Metz, Greene Moore, Samuel L. Morgan, Asa C. Matthews, Sarah McNutt, George McNutt, August Mashage, Christopher H. Miller, M. B. Mayes, George McFarland, James McWilliams, Mary E. Massie, Melville D. Massie, Logan T. Morey, Joseph McFarland, Eliza Morey, Nelson Morey, William Morey, Martha Morey, Dillard P. Motley, William Monroe, Frederick Meyer, J. M. Murray, Francis Marion, Sarah A. Morrison, William H. Myers, Jemima Myers, Newton J. Miller, Elizabeth J. Miller, Charles McCaleb, Alanson Mosier, John McLean, William McLean, Harriet Manker, John Mellhizer, Charles E. Morton, Lydia Mellhizer, Charles McDaniel, Mary McKenzie, Mary Moore, James Musgrove, Amelia J. Manker, Aurelia Nance, Clay Nickason, Clara Nickerson, Walter Nickason, George W. Nowell, Lucinda Newman, Daniel Orr, Henry Orr, Patrick Ormand, Wm. H. Odiorne, Emily Odiorne, Mary Odiorne, Sarah Odiorne, David O'Brien, Andrew P. O'Connor, Thomas Orr, Nancy J. Owsley, Theodore C. Poling, Ernst Pruesner, Mary Preusner, Milo A. Pratt, Geo. Pratt, John Penn, Mark Penick, Edwin Pendleton, Edward Prince, Virginia M. Prince, Amanda M. Pennefeather, Elijah Petty, Frank C. Priester, Wm. P. Pryor, Easton C. Peckham, Rachel Peckham, Edward C. Patterson, George P. Priest-

ley, Hannibal W. Pitzer, Emma Pitzer, Samuel Phremer, Rebecca Praul, Henry D. Praul, George F. Praul, Randolph L. Praul, Anna B. Praul, Emma D. Praul, Ida M. Praul, Samuel Rollins, Johannes Reich, James Robertson, Timothy Rogers, Frederick Reich, Melvina Ross, Daniel W. Robbins, Melvina Reed, Chas. W. Reed, John R. Reed, James D. Rupert, Mary Ramsey, J. M. Ruyle, A. D. Rachael, Jason B. Ransom, Thos. W. Rodhouse, Antina Roy, Wm. H. Raftery, C. H. Rankin, Susan F. Ramsey, Frederick Speckhart, John Speckhart, Geo. F. Speckhart, Wm. Speckhart, Adam Speckhart, Wm. Schultz, Wm. Schaffer, August Schaffer, Tylee Shepherd, John B. Shepherd, Charles W. Seymour, Edward Seymour, Abner Shinn, Joel K. Scarborough, Clarissa J. Scott, Samuel M. Spencer, Harlow M. Spencer, Joseph J. Stolte, Anton J. Stolte, M. Shepherd, William Strickhorst, Kert S. Spicer, Frank J. Stolte, Wm. H. Spencer, Sarah B. Selms, Henry J. Stolte, Seaman Sprague, James W. Sprigg, James W. Sperry Peter R. Steadman, A. B. Steadman, Sny Island Levee Drain-
6 age District, Walter Scoggan, Henry J. Sturtevant, Henry Smith, John Snider, Lubbe H. Schmidt, Solomon Shewe, Wm. G. Smith, Alice M. Smith, Melvina Smith, Louis K. Smith, Alonzo Shewe, Pulaski Shipman, Philander Shipman, James M. Shipman, Michael Strubinger, E. M. Seeley, Catherine Schleiker, Lewis P. Stone, Eugene B. Smith, Charles R. Shaw, Elvira W. Shaw, Stephen G. Shaw, George W. Schwartz, Samuel Sapp, William D. Shinn, Albion Shinn, William H. Sapp, Henrietta Smith, Charles T. Smith, Herman H. Stockheker, Mary J. Scott, Theophilus Snyder, Frank L. Schriver, John E. Sidwell, William Snyder, Augustus Simpkins, Frank Strubinger, Eliza J. Scott, John S. Scott, Margaret A. Skinner, Renslaer Sweet, Roscoe A. Sweet, Marjory Sidwell, Lizzie Shultz, Mary L. Strubinger, William A. Strubinger, Henry J. Strubinger, Sarah Strubinger, Tillie M. Strubinger, John O. Strubinger, Edwin F. Strubinger, Cora C. Strubinger, Mary E. Strubinger, Bert F. Strubinger, Roy Strubinger, Mary A. Snyder, Irene Stebbins, Frank Stebbins, Mary E. Sapp, William F. Sapp, Mary A. Sapp, Emma A. Sapp, John E. Sapp, Jr., L. A. Sapp, Charles R. Sapp, Bertie E. Sapp, Christopher C. Sapp, Edward A. Sapp, Robert J. Stillwell, Alonzo G. Sapp, Mrs. Brison Stillwell, Thomas H. Shaw, J. S. Stark, Albert J. Schmidt, Samuel Thompson, Philo E. Thompson, Clara Terhune, Sophia B. Thomas, J. S. Thomas, Jr., C. J. A. Thomas, Albert J. Thomas, W. S. Thomas, C. C. Thomas, John T. Twiggs, William Tammin, John B. Timmons, Elisha Timmons, Irwin Timmons, William Tolbert, Robert T. M. Travers, George Tipler, Franklin Titsworth, Samuel C. Thomas, Admr. of S. F. Thomas, dec'd., Samuel Taylor, George H. Tryon, Edward Tyron, M. H. B. Talbot,

Bill Adeline Turnbaugh, Mary H. Turner, James B. Thompson,
ments Mary L. Thompson, Emmeline H. Tolbert, Jacob Turn-
'89 baugh, William E. Turnbaugh, Joseph M. Thurman, James B. Thurman, J. Smith Thomas, Board of Trustees Town 3, Range 8, Board of Trustees of Township 4, Range 8; Board
7 of Trustees of Township 5, Range 7; Board of Trustees of Township 5, Range 6; Board of Trustees of Township 6, Range 6; Board of Trustees of Township 7, Range 4; Board of Trustees of Township 7, Range 5; Lewis Vorge, Abner B. Vining, Ruth A. Voshall, Sarah Voshall, John T. Voshall, Mary J. Voshall, Margaret M. Voshall, Mary Venable, Arthur Venable, Albert Venable, Alice Venable, Caroline Williamsmeier, Anna S. Woods, Thos. Worthington, Jr., Frank Westhold, John G. Wheelock, John H. Wheelock, Geo. K. Wheelock, Stanley Wheelock, Dexter Wheelock, Julia G. Wheelock, Abner V. Wills, Fielding J. Wilson, Augustus Wilkinson, Henry Wackencamp, Wm. Wilson, Eliza Wilson, Alexander D. Wilson, Sarah R. Whittaker, Helen Wells, Scott Wike, Joseph T. Whitney, William R. Wills, Lafayette Woodruff, Charlotte Westlake, Silas Wallace, John Ward, Lyman Ward, William D. Williams, Mahala R. Waggoner, Perry Wells, Elizabeth J. Wells, William R. Walston, Zephaniah T. Webster, Irwin D. Webster, George W. Wells, Edward Wells, John A. Wilson, Frederick Wiedman, Henry H. Webster, John H. Webster, E. F. Webster, Jacob Windmiller, Fred. M. Whipple, James Walsch, James A. Yingling William Yokem, America A. Yokem, Mary E. Yokem, James C. Yokem, Solomon Yokem, Henry F. Yokem, Francis Zerenburg, Levi M. Davis, James L. Edwards, Mercena Long, Lemuel Long, J. W. Long, George W. Long, John McDonald, Stephen McDonald, Joseph E. Jennings, John W. Jennings, William S. Jennings, Charles A. Jennings, A. M. D, Jones, Culver Killebrew, Nicodemus Pontera, Thomas J. Schultz, T. W. Sudbrack, Thomas J. Selby, Sup't Schools, of Calhoun Co., Ill., Samuel H. Green, Laura M. Hemphill, Joseph C. Harrison, David Shoemaker, John F. Nolte, executor of John Red, The Chicago & Alton Railroad Company, The Hannibal & Naples Railroad Company, The Chicago, Burlington & Quincy Railroad Company, The Quincy, Alton & St. Louis Railroad Company, The Wabash, St, Louis & Pacific Railway Company—*Greeting:*

All of the aforenamed defendants being citizens of the State of Illinois, and residents of the said Southern District of Illinois.

Gerritt Rosenkranz, Lewis Dutton, William Wilford, who are
8 citizens of the State of Illinois and residents of the Northern District of Illinois.

Charles M. Alger, Albert L. Allen, Alden Allen, Sarah E. Allen, Thomas H. Branham, L. T. Brittingham, I. B. Brittingham, Daniel S. Bowen, Samuel D. Barnes, Charles N. Clark, George D. Clayton, Daniel Coney, Chester Churchill, Adam Constable, Emily Cunningham, Nelson Cunningham, Frank P. Canterbury, Henry S. Carroll, C. L. Carroll, Wm. A. Davis, Jacob H. Dickason, Harriet A. Dickasou, Henry F. Davis, David Dubach, Fred. L. Dubach, Alfred M. Delano, Sarah E. Delano, Hugh A. Emison, Henry Edwards, Samuel K Floweree, William H. Fisher, Alice Fisher, William C. Forman, John H. Franklin, S. Anna Gordon, John H. Garth, William Glascock, Edward A. Glenn, Melissa Gruell, William H. Hatch, Ellen Harrington, John A. Hampton, Daniel L. Hafner, Hannibal Planing Mill Company, John R. Helms, Hannibal Bridge Company, Crow, Hargadine & Co., J. T. K. Hayward, Etta J. Hardin, William C. Hardin, Harvel Jordan, Alexander C. James and Jesse H. Rector, Administrators of the estate of John D. James, deceased, Henry P. Jaynes, Martin Kincer, Jr., Aaron R. Levering, Alfred W. Lamb, Isaac N. Linley, George W. Low, Catherine Y. Meredith, Sarah Morris, Lyman P. Munger, William A. Munger, Henry W. Morris, David M. Morris, John J. McCune, William Merriwether, John A. Mackey, Silas W. Mackey, James L. Mackey, James A. Nelson, Andrew J. Newlan, Fred. Naxera, Albert W. Pettibone, Nina M. Packard, M. G. Patterson, John B. Price, William W. Pierce, Sarah E. Parsons, Noah S. Rouse, Joseph Rowe, Edward Sharpless, Peter O. Sharpless, Mary L. Smith, Andrew J. Settles, Fannie C. Stillwell, Richard H. Stillwell, Mary Stillwell, Harold Stillwell, Earl Stillwell, Lucian Scott, Margaret C. Schmidt, Emma L. Schmidt, Carl H. Schmidt, Asa Turner, Edward Turner, 2d, John L. VanEvery, Demas K. Ward, Lucy P. Wiggin, W. M. White, William Walden, Wilson Walker, J. T. Zook, John A.
9 Krueg, Wilson A. Kendall, William McIntosh, John O. Roberts, James W. Stark, Alfred H. Smith, Warren S. Tibbetts, Charles E. Tibbetts, William A. Trauernicht, Henry S. Carroll, William J. Mackey and Charles P. Clifford, Executors of will of Benjamin P. Clifford, deceased.

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All of the aforenamed defendants being citizens of the State of Missouri.

J. T. Davis and Lizzie Davis, who are citizens of the State of Nebraska;

William McIntire, who is a citizen ot the State of Kansas;

George E. Abbott, who is a resident of the Territory of Wyoming;

F. M. Casal, who is a citizen of the State of California;

Charles Pinger, who is a citizen of the State of Colorado;

The Connecticut Mutual Life Insurance Company, a citizen of the State of Connecticut;

Charles S. Warner and William Shively, who are citizens of the State of Indiana;

John Blaul, who is a citizen of the State of Iowa;

Eliza A. Bishop, who is a citizen of the State of Michigan;

Emma P. Stanton, who is a citizen of the State of New York;

A. E. Clark, Henry Merrill and Benjamin Strauss, who are citizens of the State of Ohio;

Hobart S. Horton and Octavia L. Horton, who are citizens of the State of Louisiana;

Smith S. Thomas, who is a citizen of the State of Texas;

The North Western Mutual Life Insurance Company, a citizen of the State of Wisconsin;

And the following named defendants, who are citizens of States other than the State of Michigan, but the State of which the said defendants are severally citizens is, after diligent inquiry in that behalf, unknown to your orators:

James Aicons, George I. Ames, Franklin Bartlett, Alvey D. Buckley, John J. Bell, John Cole, Henry Churchill, Thomas Clarkson, John E. Dean, Lewis P. Drexler, Enos Devon, Augustus Eggman, Fred E. Green, James P. Fisher, Clarkson Gridley, William C. Harrington, James House, Catherine S. Harvey, Augustus Hanschild, Frederick Hoffman, Fannie V. Hubbard, Fannie V. Hubbard, Jr., Thomas King, Samuel Kern, J. R. Kiser, Rodney Lambert, Harvey Miller, Berntia Miller, Minor J. Mattison B. W. Moore, James T. Myers, George Miller, Daniel Morgan, David McWilliams, A. R. McCoun, John S. Mullen, Elmer Miller, Parmelia Nance, Frank Orea, Eugene B. Pierce, Newton J. Parker, George Robinson, Charles Robb, George J. Shaw, Cyrus Stewart, Charles Standhart, John W. Smith, H. T. Shaw, Sumner J. Smith, H. R. Smith, Susan L. Sibley, Florence A. Strong, Bertha Stobemack, John E. Sloan, Sue M. Wagy, Alfred Worland, Daniel Weeks, Abram C. Anderson, James W. Anderson, John W. Crader, Henry Cutter, Susan DeMare, Warren S. Foote, Daniel Farrow, Mary Gill, S. S. Miller, J. Miller, J. W. Snodgrass, George A. Kibbe, Angela Iming, Ella K. Turner.

And thereupon your orators complain and say, that heretofore, to-wit, on the 4th day of May, 1878, Francis Palms, then a citizen of the State of Michigan, but since that time deceased, exhibited his bill in equity, on behalf of himself, and all other persons who are interested with him, in the enforcement of the collection of certain moneys in the said bill particularly specified, who would come in and contribute to the expenses of said suit against John G. Wheelock, George W. Jones and Benjamin F. Westlake, defendants, who were citizens of the State of Illinois, which said bill still remains of record in this Honorable Court, and is referred to and made part of this, your Orator's Original Bill, in the nature of a Supplemental Bill, and Bill of Revivor. Original & Amended filed Apr

And your orators would further show unto your Honors, that process was duly issued upon said Bill, and served upon said defendants in due form of law, and they entered their appearance thereto, as required by the rules and practice of this Honorable Court, all of which will more fully and at large appear by reference to the record thereof, still remaining in this court.

And your Orators would further show unto your Honors, that afterwards, to-wit, on the 13th day of March, A. D. 1879, the said Francis Palms, then alive, obtained the leave of this Hon-
11 orable Court to amend his said Bill. which he then and there did, and filed his said amendment, all of which said order, allowing the said Francis Palms to amend his said Bill, and the said amendments so made under said order, are of record in this Honorable Court, and all referred to for certainty.

In and by which said Bill, as amended, said complainant Francis Palms, alleged and set forth: that on and before April 24th, 1871, the persons described in Exhibit A, to said Bill, were the owners of the different tracts of land therein described, aggregating about One Hundred and Ten Thousand Acres, and situated in the counties of Pike, Adams and Calhoun, in the State of Illinois; that said tracts were contiguous to each other and were located in the Mississippi River bottom, between said River and the East line of the bluffs thereof; were low and nearly level and traversed by a slough or bayou known as the Sny Carte Slough, all being below the high water mark of said River and without any protection therefrom and subject to overflow; that said lands were wet and marshy and in an unhealthy and dangerous condition, unfit for cultivation, of an average value of not exceeding fifty cents an acre, and could not be reclaimed or protected except by drains, ditches and levees; that the several tracts could not be protected or reclaimed by independent works, but only by the joint co-opera-

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tion of all parties interested therein, who were unable to agree upon a plan or raise the means required to construct adequate works; that the persons named, together with others, caused and procured the passage, by the General Assembly of the State of Illinois, on the 24th of April, 1871, of an act entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," which said act took effect July 1st, 1871; that subsequently and in the August term A. D. 1871, of the County Court of Pike County, in the State of Illinois, certain owners of certain of said lands (who are specifically named in said Originai Bill) in their own behalf, and in the behalf of all the other owners of said lands, filed a petition under said act in the County Court for the County of Pike, then and there having jurisdiction under said act to
12 hear and determine the same, and in and by said petition described the location and situation of said lands as above stated; stated their desire to construct drains, ditches and a levee and other works across the said bottom lands, for agricultural and sanitary purposes, and to reclaim said bottom lands from overflow, in order to make the lands salubrious and fit for tillage, and further represented that it was necessary to construct drains and ditches, levees and other works for said purposes; that by reason of the situation of said lands the greater portion thereof was nearly every year inundated, and all said lands were subject to inundation and had been repeatedly submerged by said river, which at such times extended from bluff to bluff, and was from four to eight miles in width; that in consequence the mass of said lands had been allowed to remain in their primitive condition, and would so remain unless reclaimed; were sparsely populated by occupants whose exclusive occupation was the cultivation of the soil, who were embarrassed in putting in their crops by the irregular periods and character of the rises in said river; that it was necessary for the drainage and reclamation of said bottom lands to construct a levee and other works, being an earth embankment as high as the high water mark of 1851, beginning in the township of Fall Creek, Adams County, thence continuing through Pike County and terminating in Hamburgh Township in Calhoun County, of sufficient width to resist the waters and as near to the bank of the river as expedient; they therefore prayed said County Court of Pike County to appoint Commissioners under and by virtue of said act of the General Assembly of the State of Illinois, for the purpose of constructing a levee in the manner and along the route above stated, and to do and perform all things necessary and authorized to be done by and under said act; that if such Commissioners should report that said levee and works could be constructed at a cost of less

that five dollars an acre, that said court should confirm the report and order the work done by said Commissioners; and Original & Amended filed Apr.
that such assessments as might be made upon the property
13 benefitted by said work, should be payable with interest at ten per cent per annum, in ten equal annual installments, the first thereof payable three years after appointment of the Commissioners and the filing in court of the plans and specifications for said works. That said petitioners gave due and legal notice as required by said act by the posting and publication of notices of their intention to present said petition to said court; that thereupon said county court at its September term, 1871, found that the proposed ditches, drains and levees set forth in said petition were necessary and useful for the drainage of said lands for agricultural and sanitary purposes, and appointed three persons as Commissioners to lay out and construct the same as authorized by said act, and directed them to proceed in accordance with the terms of said act; that said Commissioners took the oath prescribed by law, organized by the election of a chairman and secretary, and duly qualified as such Commissioners, and thereupon became legally authorized to proceed with the construction of said drains, ditches and levees; that said Commissioners then examined the lands proposed to be drained, and the lands over which said levee and works were proposed to be built, and reported the route thereof, its probable cost, the injury to the lands from the construction of said work, which was estimated at $3,000; that all the lands included in the limits mentioned in said petition would be benefited thereby, except the lands on which the levee would be built, and the lands from which the earth of which said levee would be built would be taken; that the cost would not exceed $500,000, and the aggregate benefits of said levee would exceed the cost thereof.

Said Commissioners, with their report, submitted the report of a competent engineer, showing his surveys and estimates of the proposed levee and the quantity of land which would be reclaimed thereby, together with a map of the district and a profile of the work to be done; that such proceedings were had under said petition that at the December term, 1871, of said Pike County Court, upon full and legal notice to all concerned, and without objection on the part of any one, the report of said Commissioners was duly approved and confirmed, a jury was ordered, em-
14 panneled and duly sworn, who examined said lands, assessed the damages and benefits, and made out a proper assessment roll, a copy whereof is Exhibit A, attached to the Original Bill. That subsequently, and with due regularity, the proceedings of

said jury were confirmed, and all necessary steps were taken for the obtaining of a deeree of said County Court confirming the report and assessment of said jury, and ordering it spread upon the records of the court, payable as follows:

One-tenth in each of the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, with interest at ten per cent. per annum upon said assessments, to be collected from the owners of said tracts from the 1st day of October, 1872. Immediately after such order the Clerk made and certified to said Commissioners copies of the same for Pike, Adams and Calhoun counties, which were before December 18th, 1872, duly recorded in said counties, and became notice to all persons of the lien of said assessments upon said lands; that said Commissioners acquired the legal title to the lands required for the site of said levee, and in reliance on said assessments, contracted for the construction and completion of said levee; and under the authority of said act and an order of said Pike County Court, borrowed, upon bonds issued by them, $499,500, payable at different dates with annual interest at ten per cent. per annum, and sold the same, relying on the acts of the General Assembly aforesaid, and confiding in the integrity and sense of justice of the said land owners, of which said Francis Palms purchased at par $202,500, and the Commissioners used said money in the construction and completion of said levee; that thereafter it became necessary to raise an additional sum to complete said levee, and a second petition was filed substantially similar to the first, and like proceedings thereon were had, and an additional assessment was made for the sum of $148,500, under which said Commissioners issued and offered for sale $148,500 of bonds, which were all taken by said Francis Palms. Relying upon the facts before mentioned, and upon the further fact that the owners of the lands benefitted had raised and furnished the defendants, from and on account of the assessments upon their lands, the moneys necessary to pay the interest coupons on said bonds maturing in 1873 and 1874, at par, and the money received by said Commissioners therefor was expended in the construction and completion of said levee; that said Commissioners constructed said levee and other works in accordance with said plans and surveys to such height that all said lands were protected from overflow from the Mississippi River, and all said lands were reclaimed and rendered healthy and productive, and benefitted to an amount greatly in excess of the sums assessed against them, and the entire expense was paid for by said Commissioners, with full knowledge of all the owners and occupants thereof, out of the money advanced

by said Palms and other purchasers of said bonds; that among other provisions for the collection of said assessments, said Commissioners were bound by the terms of said Act of the Illinois General Assembly, to proceed to collect said assessments, and authorized, at their discretion, to certify such assessment, or any installments thereof, to the Clerk of the county in which any of said lands lay for extension by him upon the tax books of the year for collection; that other provisions for the collection of this assessment were made by another act of the General Assembly of Illinois, procured to be passed by the owners and occupants of said lands entitled "An act to provide for the registration of drainage and levee bonds." And said Bill further charges upon information and belief that said Commissioners did make some effort to collect some installments of said assessment under the act aforesaid, which were resisted by landowners, and the Courts of Illinois before whom the case was brought refused to give effect to the provisions of said Acts, so far as they purported to authorize a collection of such assessment by tax Collectors by means of extensions on the tax books, and no means were left for such collection except such as might be supplied by the general authority of the Courts having jurisdiction of such questions; that the whole amount of said bonds of Complainant and others was unpaid, but the Commissioners were in possession of said levee and continuing to use the same, and protecting thereby their own and other lands from overflow; that after the said decision of the Supreme Court of the State of Illinois above stated, the defendants, at the request of the land owners, took, retained and kept possession of said levee, and kept the same in repair, for which purpose the land owners provided a fund by conveying to the said Commissioners, defendants as aforesaid, about 30,000 acres of said lands, which were severally chargeable with assessments applicable to the repayment of your Orator to an amount exceeding $100,000. Original & Amended Apr. 16

Yet said Commissioners refused to pay Complainant and other bondholders any portion of the principal thereof, or interest thereon, and also refused to enforce the collection of said assessment or the interest thereon, and refused to collect and pay to Complainant the assessments on the lands so above conveyed to them; that as Complainant was remediless at law he prayed process against defendants;

A decree for an accounting of the moneys advanced by Complainant to said Commissioners as aforesaid, and interest thereon at ten per cent. per annum, according to the terms of said bonds;

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A decree that Complainant have for such amount a lien upon the levee and works, and the lands acquired by the Commissioners for the site thereof, and upon the assessments and interest thereon, upon the other lands described in Exhibit A, for the benefits of said levee and other works;

A decree that the Commissioners be ordered to proceed forthwith to collect said assessments and interests under the order and direction of the court;

For the appointment of Receivers to take charge of said levee, and control and manage the same, together with all books and papers and property of said Commissioners, and to collect, under the direction of the Court, said assessments and interest, and for other and further relief.

17 And your orators further show unto your Honors that afterward, to-wit, on the 13th day of March, 1879, the said defendants filed their Answer to the said Bill as amended, which said Answer still remains of record in this Honorable Court, to which they pray leave to refer, and in which the said defendants admitted their appointment as Commissioners under the proceedings in the County Court of Pike county, as alleged in the Bill, their qualification and entrance upon the duties of their office as prescribed by the statute, to-wit, an act of the General Assembly of the State of Illinois, entitled "An act to provide for the construction of drains, ditches and other work," approved April 24th, 1871. That they admit that certain of the landowners described in said Bill, and in this Bill also named, did aid and assist in procuring the passage of the said act; that they as Commissioners issued and sold the bonds as charged in the Original Bill, by delivering and paying said bonds to the contractor for the building of the levee; and that the moneys raised by the bonds aforesaid were applied and used in the construction of said levee; that the amount provided to be raised under the original estimate and order of the Pike County Court proved inadequate, and thereupon the subsequent petition set forth in the Bill and the subsequent proceedings detailed in said Bill were had in said court for the raising of an additional sum of money as set forth in said Bill, and the additional bonds were issued as alleged in said Bill, and paid by respondents to the contractors for said levee work; that they accepted the said levee when it was completed by the contractors constructing the same, and received it as a complete levee, sufficient in height and strength to protect said lands from overflow. And they further claimed in their said Answer that because of the registry by the

holders of said bonds of the same in the office of the Auditor of Public Accounts, in the State of Illinois, under an act amendatory of said above recited act, approved April 9th, 1872, the holders of said bonds thereby elected the mode prescribed in said amendatory act for the collection of interest on said bonds, and respondents were by the election of said holders of said bonds relieved from the duty of looking after the same, and were in no wise responsible at all for the failure to collect the moneys to pay said interest, and had thereafter no duty whatever to perform in respect to the collecting of said assessments by the provisions of the statute referred to. That certain of the land owners described in said Original Bill had at all times opposed the proceedings by which their lands had been subjected to assessment for benefits, by reason of said levee, and had refused to pay assessments or taxes grounded on such assessments, by reason of which certain other land owners, otherwise inclined to pay their assessments, saw at once the futility of so doing unless payment could be enforced against all alike, which resulted in a return by the local or township collectors, within whose towns the said lands were situated, of all, or nearly all of said lands as were delinquent. That thereupon the county collector made application for judgment for the taxes and assessments against said delinquent lands, to the County Court of Pike county, Illinois, at the..... .term of .....setting up that the land owners, or a portion of them, so opposing said assessments, appeared and defended against the judgment against their lands for such assessments, setting up that the law under which they were imposed was unconstitutional and void. That respondents employed counsel in their behalf, and judgment was given by the County Court against the lands for unpaid assessments, from which appeals were taken to the Circuit Court by the resisting land owners, and the judgments against their lands there affirmed. That appeals from these latter judgments were prosecuted by the resistants to the Supreme Court of this State, one appeal by a stipulation to be decisive of all the appeals. That respondents being fully apprised of the importance of the questions involved in said appeals, employed eminent counsel to assist in the presentment and argument of the case in the Supreme Court, and upon a full argument the decision of said Court was rendered adversely to the right to collect said assessment. That respondents presented to the Court their petition for a reargument of said cause, and adduced reasons and arguments therefor, but said petition was overruled, and the final judgment rendered by said Court was adverse to the right to collect said assessments. That they were advised and believed that said case is decisive against any right on

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their part in any manner to enforce payment of said assessments. They averred that "as such Commissioners they are not now, and never have been, in any actual possession of any part of said levee, except for the purpose of constructing, maintaining and repairing the same; and they are advised and believe they never had title to any portion of said levee, on account of the unconstitutionality of the law under which said work was done; and since said law was declared unconstitutional these respondents have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners who supplied them with funds for that purpose, and in whose behalf they have in like private capacity tried to keep said levee in repair."

And thereupon the said cause was, on said 13th day of March, 1879, set down for hearing upon the Bill, and Answer, and after having been argued by counsel of the respective parties, and fully considered by the Court, this Honorable Court did then and there order, adjudge and decree in substance, as follows:

"That the said defendants take, retain and hold the right of way, levee and other works and property in question, and described in the pleadings, and keep, take care of, preserve and protect the same, under the order and control of this Court, for the benefit of and on behalf of the complainants and all other parties interested therein, or who may hereafter be found to be interested in the same, in whole or in part."

And it was further ordered by the Court, that the complainants and all other persons who may have loaned or advanced moneys to the defendants for the acquisition by them of the right of way, or for the construction of the said levee and other works or property connected therewith, or who may be the holders of any of the bonds issued by the said defendants to raise money for the purposes aforesaid, or to pay for such right of way, or the construction of such levee and other works, or to pay any of the proper expenses connected therewith, who may come into this suit, contributing their proper proportion to the expenses thereof, have liberty to go before the Master and produce their said bonds and coupons for interest thereon, and make proof of the amount due them of principal and interest on account of such loans, advances and bonds, and the cause is referred to John A. Jones, Master in Chancery, for the purposes aforesaid, who will, upon the application of the complainant or other person who may have come

into the cause as complainant, upon the terms hereinbefore described, and reasonable notice to their solicitors, proceed to take proof of the amounts due the complainants and other parties who may have, before that time, come into the cause, and after such proofs are taken, make a report to the Court of the amounts found by him to be due each and every party who may appear before him, and the grounds and facts of his several findings and conclusions." Original & Amend filed Apr.

"And it is further ordered, adjudged and decreed by the Court, that after the coming in of the Master's report of the amount or amounts found by him to be due to the complainants, or other persons who may come into the cause as aforesaid, and the approval of the said report, and the determination and adjustment by the Court of the amount or amounts due to the complainants or other persons who may have come into the cause, for moneys advanced or loaned, or bonds held as aforesaid, the said complainant or other persons have liberty to exhibit and file their Supplemental Bill or bills against any or all the present or former owners of the said lands alleged in said Bill to be benefited by said levee and other works, or the lands benefited thereby, to compel them to contribute to the payment of the amount or amounts which may be found due to the said complainants or other persons as aforesaid, and for such other and further relief as they may be advised, they are entitled to, and the Court reserves all other questions of
21 relief to the parties. and of costs, to be considered hereafter; and the said complainants are at liberty to use the names of the defendants in any such proceeding by way of Supplemental Bill; if they are advised it is necessary for them to do so, upon tendering them sufficient indemnity against all costs and expenses."

And your Orators would further show unto your Honors that after the rendition of said decree, certain persons to-wit, The First National Bank of Salem, North Carolina, Curtis Guild, J. W. Daniells, I. F. Kimball, Horatio Smith, William Goddard, Daniel Day, A. Grannis, Alice Ducharme, C. Van Huson, Sarah Ann Smith, Andrew Moody, E. P. Kimball, J. K. Lord, N. R. Stidman, Albert Blair, Amos J. Stillwell, John E. Stillwell, John H. Garth, David Dubach, Margaret A. Stillwell, John A. Stillwell, Jessie A. Stillwell, Mabel Stillwell and Mary A. Stillwell, by their several petitions, which were filed and are still of record in said court, represented to this Honorable Court that they were the holders, to the amount stated in their several petitions, of the bonds issued by the defendants, Commissioners as aforesaid, to raise money for the acquisition of the right of way, and for the construction of such

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levee and other works connected therewith, and to pay the expenses thereof, and prayed to come into said cause with the said Francis Palms, as complainants in said Bill, all of which will more fully and at large appear by reference to their said petitions, and they, with the said Francis Palms, who was then alive, afterwards, to-wit, on the 22d day of June, A. D. 1880, upon due notice given to the defendants, appeared before John A. Jones, Master in Chancery, to whom the cause was referred, and produced to him their said bonds named in their several petitions, with the interest coupons, and made due proof thereof, and the said Master computed the interest due to the said Francis Palms and the other persons above named, respectively, and found due to the said Palms and said other persons, respectively, for interest on their said bonds, the amounts set forth in his report, which was afterwards, on the 1st day of July, A. D. 1880, filed in the office of the clerk of said Court.

Your Orators would further show unto your Honors, that af-
22 terwards, to-wit, on the 7th day of July, A. D. 1880, the following decree was rendered in said cause:

"And now, on this 7th day of July, A. D. 1880, come again the complainants by their solicitors, and submitted the report of John A. Jones, Master in Chancery, to whom this cause was referred by an order made on the 13th day of March, A. D. 1879, and also came the defendants, by their solicitors, Messrs. Hay, Greene & Littler, and filed their exceptions to the said report of said Master; and the court having heard the arguments of counsel for the respective parties upon the said report, and the exceptions thereto, it was ordered, adjudged and decreed by the Court that said exceptions are overruled, and the said report of the said Master be in all things confirmed and approved.

And the Court doth further order, adjudge and decree, that there is due to the several complainants upon their respective coupons produced and proved before the said Master, and for interest upon the amounts of such coupons from the date of their maturity up to the 1st day of July, 1880, as reported by the said Master, the following sums, that is to say:— * * *, making an aggregate sum, so found to be due to the complainants as aforesaid, of three hundred and four thousand, nine hundred and eighty dollars, and twenty-six cents ($304,980.26). The above amounts are found to be due without prejudice."

"It is further ordered, adjudged and decreed by the Court, that the several sums of money so found to be due to the said com-

plainants as aforesaid, are a lien upon the assessments made under the order of the County Court of Pike County, in the State of Illinois, upon the lands described in the bound book, "Exhibit A," with Complainants' Bill, and upon the said lands as provided in the twenty-seventh and thirty-seventh sections of an act of the General Assembly of the State of Illinois, entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," approved April 24, 1871." Original & Amend'd filed Apr.

And it further appearing to the Court that the defendants,
23 Commissioners, under the several orders of the County Court of Pike County, aforesaid, have no money in their hands for the payment of the amounts so found and adjudged to be due to the said several complainants; and it also appearing to the Court, from the allegations of the Complainants' Bill, and not denied by the said defendants in their Answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the Court "that the Complainants have the right and liberty to proceed in this Court, in the name of the said defendants, as Complainants, as such Commissioners, or in their own names as Complainants, against the lands described in the said 'Exhibit A,' and the owners thereof, or such of such lands, and the owners thereof, or other persons; and said Commissioners, as they may be advised are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original, supplemental, or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit."

And your Orators would further show unto your Honors that said Francis Palms, named as Complainant in the Original Bill of Complainant herein, having departed this life on or about the .... day of ....., 18.., leaving your Orators, Michael W. O'Brien, Francis F. Palms, and Clothilde Palms, Executors of his last will and testament, in whom, as such Executors by said will, the legal and equitable title to the said bonds and sums of money so due said Francis Palms as aforesaid, vested, and afterwards, to-wit, on the ..... day of ....., A. D. 18.., by order and decree of this Court, the said Michael W. O'Brien, Francis Palms and Clothilde Palms, as Executors of said Francis Palms, were authorized to continue the prosecution of the said suit, as representatives of the said Francis Palms, with like effect as if he were still living,—all of which will appear by reference to the records of this Court.

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And your Orators hereby adopt, pursuant to the practice of this
24 Court, all and singular the allegations of the said original and amended Bills hereinbefore mentioned, as part of this their Supplemental Bill of Complaint, and beg leave to refer to the same, and have the benefit thereof, and of the decrees and orders made therein as aforesaid, in like manner, and with like effect, as if here set forth at length.

And your Orators further show unto your Honors that certain persons, who, upon their own petitions became parties complainant to the original and amended Bills herein, as hereinbefore stated, to-wit, Amos J. Stillwell, John E. Stillwell, John H. Garth, David Dubach, Margaret A. Stillwell, John A. Stillwell, Jessie A. Stillwell, Mabel Stillwell and Mary A. Stillwell, though requested by your Orators to continue parties complainant herein, and unite with your Orators in the prosecution of this their Supplemental Bill, decline and refuse so to do, wherefore your Orators, under the leave granted to them in that behalf by the decree of this Court hereinbefore mentioned, proceed with this, their Supplemental Bill, and on their own behalf, and without uniting the said persons last named as complainants therein; and your Orators have made certain of the last mentioned persons, to-wit, John H. Garth and David Dubach, and the heirs-at-law of Amos J. Stillwell, he having departed this life, with respect to their interests in the lands benefited by the said assessments and the expenditure of the moneys of your Orators in benefiting their lands as hereinafter set forth, parties defendant to this, their Supplemental Bill of Complaint.

And your Orators further show unto your Honors, by way of supplement that your Orators, Michael W. O'Brien, Francis Palms and Clothilde Palms, Executors of the Will, and Trustees of the Estate, of the late Francis Palms, deceased, and your Orators named in the caption of this Bill, are still the holders and owners of all of the said bonds described in the Original Bill of the said Francis Palms, deceased, and in the petition of your Orators severally, and in the report of the said John A. Jones, Master as
25 aforesaid, and in the orders and decrees of the Court respecting said report and said bonds, and the said defendants have not paid any of the sums of money found to be due to your Orators by the said Master.

And your orators further show, that afterward and during the the years 1882, 1883, 1884, 1885, 1886, 1887 and 1888, three hundred and fifty thousand dollars of the principal of said first issue of bonds hereinbefore referred to became due and matured accord-

ing to their terms, and in addition thereto the interest unpaid thereon from the 1st day of July, 1875, at ten per cent. per annum, while of the bonds issued under and on account of the assessment made in 1875, there is no principal due or payable, but the interest thereon has accrued, also, at ten per cent. per annum, and remained unpaid since the issue of said last mentioned bonds. That among the bonds which your Orators, Executors and Trustees as aforesaid, hold of the said bonds of said Francis Palms, deceased, the following bonds, dated October 1st, 1872, and issued by said Commissioners under the assessment of 1872, have become due and matured at the respective dates, and in the amounts as stated, viz: Original & Amends filed Apr.

Bonds numbers 245 to 257, both inclusive, for $1,000 each, July 1, 1883.

Bonds numbers 268, 269, 270, 271, for $1,000 each, July 1, 1883.

Bonds numbers 272, 273, 274, 275, 276, for $1,000 each, July 1, 1883.

Bond number 277, for $1,000, and Bond number 279, for $1,000, July 1, 1883.

Bonds numbers 282 to 285, both inclusive, for $1,000 each, July 1, 1883.

Bonds numbers 291 to 294, both inclusive, for $1,000 each, July 1, 1884.

26 Bond number 313, for $1,000, and Bond number 317, for $1,000, July 1, 1884.

Bonds numbers 341 to 342, both inclusive, for $1,000 each, July 1, 1885.

Bonds numbers 344 to 345, both inclusive, for $1,000 each, July 1, 1885.

Bonds numbers 347 to 350, both inclusive, for $1,000 each, July 1, 1885.

Bond number 371, for $1,000.

Bonds numbers 376 to 377, both inclusive, for $1,000 each, July 1, 1885.

Bonds numbers 389 to 391, both inclusive, for $1,000 each, July 1, 1886.

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Bonds numbers 420 to 429, both inclusive, for $1,00 each, July 1, 1886.

Bonds numbers 430 to 433, both inclusive, for $1,000 each, July 1, 1887.

Bonds numbers 440 to 460, both inclusive, for $1,000 each, July 1, 1887.

Bonds numbers 461 to 467, both inclusive, for $1,000 each, July 1, 1887.

Bonds numbers 468 to 472, both inclusive, for $1,000 each, July 1, 1887.

Bonds numbers 474 to 475, both inclusive, for $1,000 each, July 1, 1887.

Bonds numbers 480 to 482, both inclusive, for $1,000 each, July 1, 1888.

Bonds numbers 484 to 516, both inclusive, for $1,000 each, July 1, 1888—

Together with interest at ten per cent. per annum, on each of said bonds since July 1st, 1880, up to which date the interest was found due by said Master, and confirmed by this Honorable Court in the sum of $221,228.26, being a portion of the said sum of $304,908.26.

27 And your Orators further show unto your Honors that since the decree of July 7th, 1880, certain of the assessments which were levied and laid by the assessment of the year 1872, have fallen due according to the terms of said assessment, to-wit: In October, 1882, the sum of fifty thousand dollars; in October, 1883, the sum of fifty thousand dollars; in October, 1884, the sum of fifty thousand dollars; in October, 1885, the sum of fifty thousand dollars; in October, 1886, the sum of fifty thousand dollars; in October, 1887, the sum of fifty thousand dollars; in October, 1888, the sum of fifty thousand dollars,—in all an aggregate amount of principal of said assessments of four hundred thousand dollars, in addition to the interest since the first day July, 1875, accruing on said assessment, pursuant to the provisions of the order making the same.

And your Orators pray that it be referred to a Master, to report in detail the parcels of lands upon which the various assessments making up said aggregate of $400,000 are laid, with the

amount thereof chargeable to each parcel, and that said Master also report in detail the various tracts of land, together with their respective assessments, of the assessment of October, 1872, still unmatured, with the dates of the maturity of the same, and the amounts.

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And your Orators further show unto your Honors, that on the 13th day of March, 1879, after the time of the rendition of the decree of that date, the said defendants, John G. Wheelock, George W. Jones, and Benjamin F. Westlake, commissioners mentioned in said decree, were in the actual possession of the levee and other works, including the right of way on the lands upon which it stands, with all its appurtenances described in the said Original Bill, for the benefit and on behalf of your Orators, and all other persons interested therein, with the duty imposed upon them by the said decree, to take, retain and hold the right of way, levee and other works and property described in the pleadings in said cause, and keep, take care of, protect and preserve, under the order and control of this Honorable Court, and they kept such possession and control until the death of the said Benjamin F. Westlake, which occurred on or about the.... 28 day of....18.., since which time no successor as Commissioner has been appointed to fill the place of said Westlake, and the said suit of said Palms and your Orators has abated as to him; and the other defendants, John G. Wheelock and George W. Jones, have remained Commissioners as aforesaid.

And your Orators would further show unto your Honors that the whole of both the issues of bonds mentioned in the Original Bill herein are still unpaid, and no interest has been paid thereon by the said George W. Jones, John G. Wheelock, Benjamin F. Westlake, or any other person or persons, and that they, the said Wheelock, Jones and Westlake, have wholly neglected their duties in respect to the collection of the assessments made upon the lands benefitted by the said levee and other works, and they have combined and confederated with the owners of the lands upon which such assessments were made, and with the defendants herein, to give to them the use and protection of said levee and other works, without the payment of any of the assessments made upon such lands for the payment of the said bonds and interest thereon, as will be hereinafter more particularly set forth.

And your Orators further show unto your Honors, by way of supplement, that they are informed and believe and so charge the fact to be that each of the several tracts and parcels of land

Bill upon which the assessments of benefits were made under and by
ments the various orders of the County Court of Pike County, Illinois,
22.'89 described in the Original Bill of Complaint herein, is chargeable in equity with and liable for the amounts assessed against each of said tracts or parcels of land as benefits, as shown and set forth in the bound book "Exhibit A," filed with the Original Bill herein, and with interest thereon, according to the tenor of the said orders of the County Court of Pike County aforesaid, making the assessments aforesaid, and that your Orators have a lien upon each and every of said tracts of land so assessed as aforesaid to the amounts of such assessments and interest as aforesaid, for the payment of the amounts of your Orators' bonds and interest
29 so found and decreed to be due them by the decrees of this Court, and for the further sums which have become due to them on account of such bonds and interest thereon since the date of said decree of this Court, and that your Orators are entitled to the aid of this Honorable Court in the enforcement of their said lien, and to subject the said several tracts and parcels of lands to the payment of the amounts so due your Orators as aforesaid.

To that end, therefore, they file this, their Original Bill, in the nature of a Supplemental Bill and Bill of Revivor, making all of the persons and corporations named in the caption hereof defendants thereto.

And your Orators further show unto your Honors, that each of the defendants aforenamed is, or claims to be, the owner of or otherwise interested in one or more of the several tracts or parcels of land upon and against which the said assessments before mentioned were made. The description of each of the said tracts or parcels of land in which each of the said defendants is interested; the number of acres of each tract assessed with benefits by the first assessment made in the year 1872; the number of acres of each tract assessed with benefits by the second assessment made in the year 1875; the amount of the assessment made on each tract by the first assessment of 1872; the amount of the assessment made on each tract by the second assessment of 1875; the aggregate amount of both of said assessments against each tract, and the name of the person in whose name each tract was assessed, are particularly shown and set forth as set opposite the name of each of said defendants in a bound book marked "Exhibit X," which is filed herewith, and made part of this Supplemental Bill of Complaint.

And your Orators further show unto your Honors that each and every of said defendants who has acquired title to any portion of said lands, in said "Exhibit X," described, since the making

and levying of each of said assessments of 1872 and 1875, herein referred to, has purchased the lands severally held and owned by him, with full notice of the existence of each of said assessments, and of the proceedings of said County Court of Pike County authorizing the said assessments, and of the issue of the bonds by said Commissioners as aforesaid, and the sale thereof to your Orators, the expenditure of the proceeds thereof in the construction of said levee and other works, and that said levee and other works were constructed solely with the moneys furnished by your Orators and others, and that the amounts furnished by your Orators for and in the construction of said levee and other works has not been repaid to your Orators.

Original & Amend filed Apr.

And your Orators further show unto your Honors that each of the said defendants has, with knowledge and notice of the matters aforesaid, appropriated and used the said levee and other works in the protection of the several tracts of land, in which he is so interested as aforesaid; in the protection of said tracts of land from overflow from the Mississippi river for long spaces of time passed, and now so appropriates and uses the same, and that neither of the said defendants has ever contributed or paid any sum of money whatever for the reimbursement of your Orators of the sums advanced for the construction of the said levee and other works.

And your Orators further show that all of the defendants in this suit who were named in said "Exhibit A" to the Original Bill, participated in causing the said bonds to be issued and sold to your Orators' testator, and the proceeds thereof to be expended in the construction of said levee by actively soliciting and procuring the passage of the said act to provide for the construction of levees, approved April 24th, 1871. That certain others of the defendants in this suit purchased the lands now owned by them of or through such land owners as last described, with full knowledge of the acts and conduct of said land owners, as above and hereinafter stated, and with full notice of the existence of said assessments, and that they were unpaid and constituted a lien upon the lands against which respectively they were assessed, and of your Orators' equities thereunder; that all of the defendants herein who acquired title to the lands now claimed by them since the 4th day of May, 1878, purchased the same with notice of your Orators' equities and the existence of said assessments, and that the same were unpaid because your Orators' Original Bill was on that day filed and still remains pending and of record in this Honorable Court; that in addition to the pendency

Bill ments 22,'89 of your Orators' said Original Bill, the decrees of this Honorable court of March 13th, 1879, and July 7th, 1880, by the terms of which said levee and other works were put in the hands of said defendants in that suit as Receivers and Agents of your Orators, were notice to purchasers of any of the lands in question of the existence of said assessments, and your Orators' equities in respect thereto.

And your Orators further show unto your Honors that certain of the said defendants, to-wit: M. M. Aldrich, Jeremiah G. Adams, John Burkholder, E. C. Bridge, John H. Brammell, Harrison Brown, Samuel Clark, Ason G. Chamberlain, Joseph C. Colvin, Charles B. Dustin, James M. Davis, Henry Edwards, Joseph Elliott, Charles B. Gose, Dennis Green, John D. Garton, Daniel L. Hafner, James M. Henry, James S. Irwin, Henry W. Morris, George McFarland, Melville D. Massie, Francis Marion, Henry Orr, Elijah Petty, Noah S. Rouse, James D. Rupert, Samuel M. Spencer, James W. Sperry, Philander Shipman, Samuel Taylor, Smith S. Thomas, Jacob Turnbaugh, John G. Wheelock, John Ward, Perry Wells and William Yoken, participated in causing the said bonds to be issued and sold to your Orators, and the proceeds thereof to be expended in the construction of the said levee and other works, and in causing the said assessments to be made on the lands benefitted by such levee and other works by the County Court of Pike County, as shown in "Exhibit A" of the Original Bill, for the repayment of the amount of the said bonds of your Orators, with the interest thereon according to their tenor and effect, by signing and presenting to the County Court of Pike County, in the year 1872, the original petition upon which all the proceedings in the said County Court of Pike County, Illinois, in that behalf were based.

That certain other of the defendants purchased the lands now
32 owned by them, of or through other land owners who had joined with the defendants last named in signing and presenting to the Pike County Court the last mentioned petition, with full knowledge of the acts and conduct of said land owners last mentioned, and with full notice of the existence of said assessments, and that they were unpaid, and constituted a lien upon said lands against which respectively they were assessed.

And your Orators would further show unto your Honors that certain of the said defendants, to-wit: M. M. Aldrich, Jeremiah G. Adams, Thomas H. Branham, Samuel D. Barnes, Norman Brown, Charles N. Clark, Joseph C. Colvin, William H. Davis,

John N. Dewell, Charles B. Dustin, Philip Donahoe, Dennis Green, Michael W. Hughes, Daniel L. Hafner, Henry W. Morris, Asa C. Matthews, Melville D. Massie, Elijah Petty, Noah S. Rouse, Joel K. Scarborough, Samuel M. Spencer, Demas K. Ward and William McIntosh, participated in procuring the said bonds to be issued and sold to your Orators, and in the expenditure of the proceeds of the sales of said bonds in the construction of the levee and other works in the Original Bill herein described, and in causing the said lands described in said "Exhibit A" to be assessed by the order and decree of the County Court of Pike County, Illinois, to the amounts in said "Exhibit A" set forth, for the purpose of paying the principal and interest of the said bonds of your Orators, according to their tenor and effect, by signing and causing to be filed, on the 30th day of November, A. D. 1874, the petition for the additional or second assessment of said lands, and in accordance with which petition of the said defendants, the said second or additional assessment was made in the year 1875, to the amounts shown in the said "Exhibit A."

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That certain other of the defendants purchased the lands now owned by them of or through other land owners who had joined with the defendants last named in signing and presenting to the Pike County Court the said last mentioned petition with full knowledge of the acts and conduct of said last mentioned land owners, and with full notice of the existence of said assess-
33 ments, and that they were unpaid and constituted a lien upon said lands against which they were respectively assessed.

And your Orators would further show unto your Honors that certain of the said defendants, to-wit: Albert L. Allen, Alden Allen, Jeremiah G. Adams, James Aicons, Edward H. Buckley, John Burkholder, George Baker, Richard H. Baker, John H. Brammell, John W. Brammell, Enoch R. Chatten, Charles N. Clark, Samuel Clark, Ason G. Chamberlain, Thomas Clarkson, Jacob H. Dickason, Charles B. Dustin, Phillip Donahoe, Joseph Elliott, Wilson B. Elliott, George Ferguson, Irene M. Fesler, Dennis Green, Mary M. Grammar, DeWitt Greene, William H. Gay, James Gay, Daniel L. Hafner, William H. Hyde, Virginia Hyde, James M. Henry, Hobart S. Horton, Isaac A. Hoskin, James S. Irwin, George W. Jones, Aaron R. Levering, Alfred W. Lamb, William Livingston, William A. Munger, Eilert Miller, Henry W. Morris, Brice McCrory, Asa C. Matthews, Mary E. Massie, Melville D. Massie, Newton J. Miller, Elizabeth J. Miller, James A. Nelson, William H. Odiorne, Edward Prince, Elijah Petty, Charles Pinger, Hannibal W. Pitzer, Emma Pitzer, Samuel Phremer, Noah S. Rouse, Daniel W. Robbins, John R.

Bill Amendments Apr. 12, '89

Reed, James D. Rupert, William H. Raftery, Edward Seymour, Joel K. Scarborough, Joseph J. Stolte, Walter Scoggan, Michael Strubinger, John W. Smith, Samuel Sapp, William D. Shinn, Albion Shinn, Theophilus Snyder, Demas K. Ward, John H. Wheelock, Abner V. Wills, Dexter Wheelock, Scott Wike, Sarah R. Whitaker, William R. Wills, in the year 1877, and after the Supreme Court of the State of Illinois had refused to permit the assessments made under the authority of the County Court of Pike County, Illinois, for the payment of the principal and interest of your Orators' said bonds, by virtue of the taxing power, and through the agencies provided by the acts of the General Assembly of the State of Illinois, in the said Original Bill set forth, the said defendants last named, well knowing that the said levee and other works had been constructed with the moneys of your Orators, the proceeds of the said bonds purchased and held by them as aforesaid, and well knowing that the amounts of the said
34 bonds and the interests thereon was wholly unpaid to your Orators; and then and there well knowing of and authorizing and consenting to all the proceedings of the County Court of Pike county, upon which the said bonds had been issued and sold to your Orators, and the proceeds of the sales of such bonds expended in the construction of the said levee and other works; and having authorized the assessment of their lands for the payment of the principal and interest of said bonds, to the amounts set forth in said "Exhibit A," with the Original Bill herein, combined among themselves, and with the said George W. Jones, John G. Wheelock and Benjamin F. Westlake, the Commissioners hereinbefore named, whose duty it was (to the knowledge of said defendants) to collect the said assessments and pay the amounts thereof to your Orators in the discharge of the principal and interest of said bonds, and then and there, for the purpose of defeating the just claims of your Orators, the said George W. Jones, John G. Wheelock and Benjamin F. Westlake, at the request and by the procurement of the said last named defendants, and as the agents and trustees of said last named defendants took the exclusive possession and control of the said levee and other works, so constructed with the moneys of your Orators, and used and appropriated the said levee and other works to the protection of the lands of the said defendants, under and by virtue of a certain pretended Deed of Trust, a copy whereof is herewith filed with the Original Bill herein, marked "Exhibit O," to which, for greater certainty, reference is hereby made, in and by which said Deed of Trust it was stipulated and agreed between the said George W. Jones, John G. Wheelock and Benjamin F. Westlake on the one hand, and the said last named defendants on other, among other things, that

no part of the funds collected by said Jones, Wheelock and Westlake should ever be applied to the payment of any indebtedness created by or on account of the original construction of the said levee. Original & Amend filed Apr

And your Orators show unto your Honors that the said Deed of Trust last mentioned continued in force and effect up to and until the....day of....1877, when the same was cancelled and released by the deeds of the parties thereto, the said Jones, Wheelock and Westlake, and the said defendants, and other defendants hereinafter named, having in the meantime devised and attempted to execute another and more extensive scheme for defeating your Orators in recovering the moneys by them furnished in the construction of the said levee and other works, as hereinafter stated.

That certain other of the defendants purchased the lands now owned by them, of or through other land owners who had joined with the defendants last named in executing said Trust Deed and taking the aforesaid action thereunder with full knowledge and notice of the acts and conduct of said last mentioned land owners, and with full notice of the existence of said assessments, and that they were unpaid, and constituted a lien upon the lands against which they were respectively assessed.

And your Orators further show unto your Honors, by way of supplement, that after the rendition of the said decree of this Court, of date, March 13th, 1879, to-wit: on the 26th day of January, A. D. 1880, certain of the defendants, John E. Adams, Albert L. Allen, Harry B. Atkinson, Jeremiah G. Adams, Matthew Abrams, Richard H. Baker, George Baker, Thomas H. Branham, John Burkholder, John H. Brammell, John W. Brammell, Isaac Barton, William T. Barton, Enoch R. Chatten, Charles N. Clark, Mary Crews, William N. Caldwell, Andrew J. Crews, Samuel Clark, Ason G. Chamberlain, Patrick H. Cashman, Landy S. Cory, Joseph C. Colvin, Orlando Camp, Samuel Clemens, Thomas Clarkson, Jacob H. Dickason, Harriet A. Dickason, William H. Davis, David Dubach, Fred. L. Dubach, Charles B. Dustin, Phillip Donahoe, James M. Davis, Joseph Elliott, Wilson B. Elliott, James Emerson, George Ferguson, Nelson French, Irene M. Fesler, John H. Garth, William Groh, Ernst Gilhaus, S. Anna Gordon, Dennis Green, Mary M. Grammar, William Glasscock, DeWitt Greene, Ann Gard, John D. Gorton, William H. Gay, James Gay, Daniel L. Hafner, Ozias M. Hatch, Virginia Hyde, John B. Hill, Henry Heidholt,

Bill
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Mary Hosford, Hepsy J. Hosford, Hilbert Hosford, Mary
36 Hosford, James M. Henry, Mary L. Horton, Octavia L. Horton, Isaac Hoskin, James S. Irwin, Francis J. Jackson, Fred. Kaiser, Thomas Kendrick, Esther Kendrick, Aaron R. Levering, Alfred W. Lamb, Eleanor Lewton, James Likes, William Livingston, Cathrine Y. Meredith, Lyman P. Munger, William A. Munger, Henry W. Morris, Brice McCrory, Bernhard Miller, Asa C. Matthews, Mary E. Massie, Melville D. Massie, Martha Morey, Logan T. Morey, David M. Morris, James L. Mackey, William Odiorne, Emily Y. Odiorne, Ernst Pruesner, Albert W. Pettibone, Elijah Petty, Wilson B. Pettibone, Charles Pinger, John B. Price, Samuel Phremer, Johannes Reisch, Noah S. Rouse, Timothy Rogers, Daniel W. Robbins, James D. Rupert, Mary Ramsey, A. D. Rachael, Jason B. Ransom, William H. Raftery, Frederick Speckhart, Adam Speckhart, John Speckhart, William Speckhart, August Schaffer, Kert S. Spicer, John B. Shepherd, Charles W. Seymour, Edward Seymour, Andrew J. Settles, Amos J. Stillwell, Joel K. Scarborough, Samuel M. Spencer, M. Shepherd, Wm. H. Spencer, Henry J. Stolte, Joseph J. Stolte, James W. Sperry, Walter Scoggan, Henry J. Sturtevant, Lucian Scott, Michael Strubinger, John W. Smith, Carl H. Schmidt, Elvira W. Shaw, Samuel Sapp, William D. Shinn, Albion Shinn, Christopher C. Sapp, Theophilus Snyder, William Tammin, Samuel Thompson, Samuel Taylor, Louisa Tryon, Emiline H. Tolbert, John L. VanEvery, Abner V. Wills, Fielding J. Wilson, Sarah R. Whittaker, Scott Wike, William R. Wills and John Ward, filed a petition signed by themselves and others in the County Court of Pike County, in the State of Illinois, in which they, the said defendants last named, describing themselves as petitioners, as alleged, stated and set forth in substance the matters following:

That they constituted a majority of the owners of the lands therein described, and that they owned one-third of the lands proposed to be reclaimed or benefited by the repairs and maintenance of the levee thereinafter named; that there was constructed under the laws of the State of Illinois, then in force, in the counties of Adams, Pike and Calhoun, in the years 1872, 1873 and 1874, a levee, upon and along the East bank of the Missis-
37 sippi River, of the length of about fifty-two miles, for the purpose of protecting from the overflow by high water, certain lands lying on the East bank of the Mississippi River, and located between the said River and the bluffs of the said river on the East side of said Counties.

And the said defendants, after describing the starting point, route and terminus of said levee, (the said levee described in the said petition being the same levee, and other works constructed with the proceeds of the bonds purchased by your Orators, and particularly referred to in the Original Bill of Complaint herein,) alleged further that the said levee was constructed under the laws of the State of Illinois, for agricultural and sanitary purposes, but more directly to reclaim from overflow, the lands subject to periodical inundation by the Mississippi River, and to fit the same for husbandry. Original & Amend. filed Apr.

And the said defendants further alleged, in their petition, that while the object for which said levee was constructed was desirable to the owners of said lands, yet the attempt was not successful; that frequent breaks had occurred in said work; that the structure is too low, and is not of sufficient strength to answer the purpose for which it was constructed; that the work was not scientifically done or performed, and hence has not accomplished the purpose for which it was made.

The said defendants then alleged that by the proper repair and maintenance of said levee, the lands aforesaid, and more fully hereinafter described as subject to overflow, amounting in the aggregate to about 90,000 acres, which are now of but little value, will be reclaimed and brought into cultivation, and that, in addition, it will greatly improve the sanitary condition of the locality through which said levee passes.

And the said defendants further stated that said levee was then in a bad state of repair; that in faith that said levee would be properly constructed and repaired and maintained, the defendants, with others, had expended large sums of money, and improved farms, which money would be lost, and the improvements washed away, unless said levee should be repaired and kept up.

38 And the defendants further alleged that it was absolutely necessary for the health and proper drainage and protection of said land that said levee be repaired as speedily as possible; that the costs and expenses thereof, and the damages occasioned thereby, and the annual expense of keeping the same in repair, would be less than the benefits that will be bestowed upon the lands to be benefited by said repairs.

The defendants then further, in their petition, described the lands which would be benefited or damaged by the repair and

Bill maintenance of said levee, and of which they were part owners, the
ndments description of the said lands being in all respects that contained in
, 22,'89 the said "Exhibit A" hereinbefore mentioned, the lands being the same lands assessed for benefits for the payment of the moneys advanced by your orators for the construction of the said levee, and other works, in the pleadings hereinbefore mentioned; and the said defendants, after giving the names of the owners of all the said tracts of land, so far as they were known to the defendants, alleged and stated that the purpose of this petition was the repair and maintenance of the levee aforesaid for agricultural and sanitary purposes, by a system of special assessments against the lands benefited, to be levied and collected in proportion to the several benefits to be found and ascertained as the law directs, and for no other purpose.

They also alleged that the greater part of the lands affected by said levee, or that will be affected by the repair and maintenance thereof, are located in the County of Pike and State of Illinois. They also alleged that they were a majority of the owners of said lands who had arrived at lawful age, and that they represented over one-third of the lands to be reclaimed or benefited by the repair and maintenance of said levee.

They further alleged, that, owing to the large extent of territory intended to be embraced in said drainage district, and that the owners of lands lying therein live at long distances from each other, and many of them are non-residents of this State, they had caused several petitions,identical in language and purpose to be circulated and signed by said land owners, which, when presented,
39 they prayed might be consolidated and treated as one for all the purposes of this proceeding; and whereas, it was contemplated that said petition might need amendment, their consent was given to any amendment of either matter, form or substance, should it be held deficient by the court, and appointed and constituted A. C. Matthews their attorney for the purpose, and authorized him to make such amendment or amendments, under direction of the court, as might be necessary to carry out the purposes and objects of said petition.

The said defendants, in and by their said petition, then pray that a drainage district, to be known as the Sny Island Levee Drainage District be formed out of and from the said lands subject to periodical overflow, as aforesaid, by the Mississippi river, in the townships aforesaid,for the repairs and maintenance of said levee as the statute provides in such cases.

That Commissioners be appointed, with the powers and authority named and mentioned in an Act of the General Assembly of the State of Illinois, approved and in force May 29, 1879, entitled "An Act to provide for the construction and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," and that said commissioners be directed to do and perform any and all acts provided in said law for repairing levees, ditches and drains, including all necessary bridges, crossings, embankments, side and other ditches, necessary to repair and maintain said levee, and to render it effective for the protection and reclamation of the lands subject to such periodical overflow as aforesaid; and that said commissioners be directed to find and estimate, among other things, the probable annual expense of keeping said levee in repair. Original & Amended filed Apr.

And the defendants further prayed that the assessments for the repair of said levee be ordered to be paid in such installments as should to the court seem most expedient with justice to the owners and the completion of the work, and for such other and further relief in the premises as to the court should seem meet.

And your orators would further show unto your honors that the said County Court of Pike county, then and there having full and complete jurisdiction under the Constitution and Laws of the State of Illinois, in that behalf, entertained the said petition of the said defendants, and made all such proper, legal orders upon the said petition, necessary and effectual to the organization of a corporation known as the Sny Island Levee Drainage District, which is made a party defendant to this Supplemental Bill, which corporation, in the year 1880, took possession and control of the said levee and other works, and still has complete control and possession thereof, and to the knowledge and with the consent and approval of all the defendants, appropriated the said levee and other works so constructed with the moneys furnished by your said orators, as aforesaid, to the protection of the said lands of all the said defendants from overflow by the Mississippi river; and your orators charge that the said last mentioned defendants, well knowing that the said levee and other works had been constructed with the funds furnished by your orators, and that the lands aforesaid had been assessed for the payment to your orators of the sums advanced for the construction of said levee and other works as aforesaid, and that no part thereof had been paid to your orators, took possession of the said levee and other works and appropriated the same to the protection of their said lands from the overflow by the Mississippi

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river, and now do, through the Sny Island Levee Drainage District, and for the period of eight years last passed, have continued to appropriate, control and use the said levee and other works so constructed with the funds advanced by your orators, and do refuse to pay to your orators any of the sums of money advanced by them for the construction of the said levee and other works.

That certain other of the defendants purchased the lands now owned by them of or through other land owners who had joined with the defendants last named in presenting said last named petition, and in organizing said Sny Island Levee Drainage District, and in all subsequent actions thereunder, with full knowledge
41 and notice of the said acts and conduct of said last mentioned land owners, and with full notice of the existence of said assessments, and that they were unpaid, and constituted a lien upon the lands against which they were respectively assessed.

And your Orators would further show unto your Honors, that certain of the defendants, to-wit: Sarah E. Allen, Thomas Able, M. M. Aldrich, Eliza D. Anderson, Henry B. Atkinson, James Aicons, Abram C. Anderson, John Brockmeier, Ernst Brockmeier, Julia Burchett, Charles Baker, Board of Trustees, Township 4, R. 8, E. T. Bridge, William H. Bridge, Carson W. Brewster, Board of Trustees, Township 5, R. 6, Harrison Brown, David Boyd, John W. Boyd, John Blaul, Board of Trustees, Township 5, R. 7, Eliza A. Bishop, Samuel D. Barnes, John Burns, Charles E. Brewster, Anna M. Brewster, Minerva M. Brewster, Danel S. Bowen, Charles H. Brown, John C. Brown, C. H. Bull, William B. Bull, William H. Beacom, Norman Brown, Francis Bartlett, Milo M. Blake, Board of Trustees, Township 7, R. 4, D. T. Ball, Edward Bybee, Fannie Bybee, Alvey D. Buckley, John J. Bell, William A. Chandler, Alexander T. Chandler, Sarah Chandler, William E. Churchill, William C. Chandler, Amanda Carter, Henry Churchill, Chester Churchill, John Clutch, Daniel Caffrey, Adam Constable, Emily Cunningham, Nelson Cunningham, Sarah F. Colvin, John Colvin, Charles Churchill, Chester R. Churchill, Elmer Churchill, Maria Churchill, Ida Churchill, John L. Cupp, Henry Cutter, Henry S. Carroll, Charles P. Clifford, John W. Crader, The Chicago & Alton Railroad Company, The Hannibal & Naples Railroad Company, The Quincy, Alton & St. Louis Railroad Company, The Chicago, Burlington & Quincy Railroad Company, The Wabash, St. Louis & Pacific Railway Company, The Hannibal Bridge Company, John E. Dean, James Demoins, Henry F. Davis, P. H. Davis, Sarah E. Delano, Jesse Dutton, Thomas Demoins, Charles C. Dewell, John N.

Dewell, A. M. Danely, Lucinda DeCamp, William DeCamp, James E. DeCamp, George M. DeCamp, Adelia DeCamp, Adeline DeCamp, Esther DeCamp, Tata DeCamp Helen Dodge, Clinton Dodge, Louis P. Drexler, Enos Deven Susan DeMarre, Augustus Eggman, James L. Edwards, W. C. Foreman, Louisa Ferguson, A. F. Ferguson, Charles W. Fleak, Daniel Farrow, James P. Fisher, Mary E. Griffin, Adam Gruell, Jr., Joseph B. Gilpin, Clarkson Gridley, Samuel B. Gaines, J. D. Gorton, Maria A. Grabill, Fred. E. Green, Augustus L. Galloway, Mary E. Griffin, Melissa Gruell, Mary Gill, Samuel H. Green, William C. Harrington, George Hack, Henry Hoyle, John B. Hill, Julia B. Hill, Barnabas Hines, Hepsy J. Hosford, Hilbert Hosford, Hobart S. Horton, Sophia Hull, Isabel Hogsett, Samuel H. Hogsett, J. T. K. Hayward, Ann Hunter, William Henry, George Henry, Aaron F. Hemphill, Alexander Hemphill, Fannie V. Hubbard, Fannie V. Hubbard, Jr., Joseph C. Harrison, Caroline Journey, Andrew M. Journey, Henry P. Jaynes, George W. Jones, Frank H. Jones, Fred Jones, Frank H. Jackson, Alice Jennings, A. M. D. Jones, Charles M. Jennings, John W. Jennings, Joseph E. Jennings, William S. Jennings, Dolly Kuchman, George King, Robert King, Martin Kincer, Jr., Emma Kennedy, Edward Kendrick, Isabella Kendrick, Samuel Kern, J. R. Kiser, Wilson A. Kendall, George A. Kibbe, Elizabeth Lyon, Mary Lyon, Rodney Lambert, George W. Low, Phœbe J. Long, William J. Long, Henry A. Long, George P. Long, Caroline Long, B. C. Lindsey, Clark F. Lovett, William P. Lovett, Andrew J. Lovell, Lemuel Long, J. W. Long, Mercena Long, Mary McKenzie, Eilert Miller, H. H. Metz, John Mellhizer, Berntia Miller, Lydia Mellhizer, M. B. Mays, William Morey, Joseph McFarland, Nelson Morey, George McFarland, Sarah McNutt, George McNutt, James T. Myers, B. W. Moore, William Monroe, John A. Mackey, Harriet Manker, Francis Marion, John McLean, Charles E. Morton, Alanson Mosier, Amelia J. Manker, William McLean, Henry Morrill, Charles McDaniel, John McDonald, William J. Mackey, Stephen McDonald, S. S. Miller, J. Miller, Clay Nickason, Walter Nickason, Lucinda Newman, Thomas Orr, Frank Orea, Mary Odiorne, Sarah Odiorne, Milo A. Pratt, Mark Penick, Charles Pinger, Easton C. Peckham, Rachel Peckham, Eugene B. Pierce, Edward Prince, Nicodemus Pontera, Rebecca Praul, Henry D. Praul, George F. Praul, Randolph L. Praul, Anna B. Praul, Emma D. Praul, Ida M. Praul, Samuel Rollins, Susan F. Ramsey, Mary Ramsey, J. M. Ruyle, Thomas W. Rodhouse, John O. Roberts, Melvina Reed, Renslaer Sweet, Roscoe A. Sweet, John Snyder, Alice M. Smith, Lewis K. Smith, Philander Shipman, H. R. Smith, Alonzo Shewe, Melvina Smith,

Original & Amended filed Apr.

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William G. Smith, Solomon Shewe, Tyiee Shepherd, Henry Smith, Louis P. Stone, Mary A. Snyder, Irene Stebbins, Frank Stebbins, Sumner J. Smith, H. H. Stockheker, George J. Shaw, Sarah Sapp, Samuel Sapp, Mary E. Sapp, William F. Sapp, Mary A. Sapp, Emma A. Sapp, John E. Sapp, Jr., L. A. Sapp, Charles R. Sapp, Bertie E. Sapp, Edward A. Sapp, Alonzo C. Sapp, William H. Sapp, Thomas H. Shaw, John Sidwell, John E. Sloan, William Snyder, Peter O. Sharpless, Edward Sharpless, David Shoemaker T. W. Sudbrack, J. W. Snodgrass, Philo E. Thompson, John B. Timmons, Elisha Timmons, R. T. M. Travers, Irwin Timmons, William Tolbert, Samuel Taylor, Clara Terhune, Joseph M. Thompson, James Thompson, Adeline Turnbaugh, J. S. Thomas, Smith S. Thomas, Charles E. Tibbitts, Warren S. Tibbitts, Ella K. Turner, Lewis Vorge, Ruth E. Voshall, Sarah A. Voshall, John T. Voshall, Mary J. Voshall, Margaret M. Voshall, Frank Westhold, Helen Wells, Demas K. Ward, William D. Williams, Lyman Ward, Henry H. Webster, E. F. Webster, Alfred Worland, William Wilford, Fred M. Whipple, John H. Webster. George W. Wells, William R. Walston, Mahala R. Waggoner, Daniel Weeks, Perry Wells, Edward Wells, William Yokem, America A. Yokem Mary E. Yokem, James C. Yokem and John F. Nolte, Ex'r. of John Red, were the owners of and interested in the lands in which they are now interested, as described in said "Exhibit X," filed with this Supplemental Bill, on the said 26th day of January, 1880, and were then and there, pursuant to the Statute of the State of Illinois then in force in relation to the organization of Drainage Districts, severally made parties to, and had due notice of all the proceedings for the organization of the said Sny Island Levee Drainage District, and of the contents of the said petition therefor, and are bound by the said proceeding, and the appropriation of the said levee and other works to the protection of their said lands from overflow, in like manner as if they had been parties petitioner in the said proceeding for the organization of the said Sny Island Levee Drainage District.

And your Orators would further show unto your Honors, that certain of the said defendants, to-wit: George E. Abbott, Buddie H. Atkinson, Joseph M. Allen, George M. Atkinson, George I. Ames, Henry L. Anderson, Clement V. Aylesworth, William L. Aaron, Fred S. Alford, James W. Anderson, G. W. L. Baker, Samuel Brown, Board of Trustees of Township 4, Range 8, Olive B. Brakefield, L. T. Brittingham, I. B. Brittingham, R. T. Bratten, W. D. Bratten, S. G. Blivin, Board of Trustees of Township 6, Range 6, Daniel C. Bates, Frank H. Brinkman, Antie S. Brinkman, Board of Trustees of Township 5, Range 6, Henry Bush, Martha A.

Martha A. Blair, John Boyd, Boyd Levee District, Edward F. Binns, Harvey O. Bancroft, Samuel Bunn, James R. Berry, John F. Berry, Cornelius Brinkman, George Brinkman, P. F. Barton, William H. Beacom, Board of Trustees of Township 7, Range 5, Crow, Hargadine & Co., F. M. Casal, Mary E. Collins, John W. Cannon, Sarah J. Clark, Charles L. Carroll, Henry S. Carroll, Frank P. Canterbury, Daniel Coney, A. E. Clark, W. B. Curtis, A. G. Coley, Anna M. Colton, Benjamin Camp, Warren Clutch, Almon J. Churchill, John Clutch, Maria Churchill, Martha Caldwell, George D. Clayton, E. A. Crandall, William E. Churchill, Connecticut Mutual Life Ins. Co., Charles P. Clifford, Levi M. Davis, Mary A. Dean, Thomas Davis, Joel L. Doud, Silas Dutton, Charles C. Dewell, A. M. Daneley, Lewis Dutton, Joseph Dober, Jeremiah Dempsey, Albert Dutcher, Henry Dutcher, Alfred M. Delano, Noble M. Dyke, John Emerson, Hugh A. Emison, John T. Emison, O. J. Edmunds, Lucy A. Ellis, Warren S. Foote, Samuel K. Floweree, William S. Fleck, August File, Jesse File, O. J. Ferguson, James Fisher, John H. Franklin, George Finley, William H. Fisher, W. C. Forman, Albert W. Fishell, John L. Freeman, George R. Fisher, Edward B. Ferguson, Wiley A. Farmer, Jacob Flegle, Philip Fusselman, Newton Fleischlein, Augustus L. Galloway, J. J. Gano, Melissa Gruell, Edward A. Glenn, Ida E. Grimes, Frank Gordon, Charles M. Gilmer, James C. Gay Christopher D. Green, Emily A. Gordon, Lewis Green, William H. Gorton, William Gelvin, William H. Govert, August Gilhaus, James R. Grove, Eliza E. Harirngton, Joseph C. Harrison, Laura M. Hemphill, John O. Hampton, Herman Heidbreder, Catherine S. Harvey, John R. Helms, Samuel E. Hewes, Charles Hanson, Adam C. Helton, Mary M. Hull, Augustus Hanschild, Lewis D. Herscheimer, Nancy Hinds, Lewis H. Hull, Daniel Hack, Hannibal Planing Mill Co., Fred Hack, Sarah E. Hornback, James Hornback, R. T. Hicks, Henry Hoyle, Harry Higbee, John A. Hampton, Samuel Heavner, William C. Hardin, Etta J. Hardin, Mary Hoskins, George Hack, Ellen Harrington, Frederik Hoffman, Werner Heidlock, George Harvey, Mary Hayden, Tyra Hayden, Daniel D. Hicks, R. W. Hart, James House, M. A. Henry, John Henry, George Hoskin, Rosella Ives, Angela Iming, John A. Krueg, Emma J. Jones, Harvel Jorden, George M. James, Eliza Jackson, W. A. Jorden, Jesse F. Johns, Alice Jennings, William H. Knodel, G. W. Klitz, C. P. Klitz, Samuel C. Kendrick, Mary J. Kendrick, Wiley P. Kennedy, Martin Kincer, Jr., George H. Kenady, Nancy E. Kendrick, Culver Killebrew, Gabriel Kay, George W. Long, Claus A. Luken, Isaac N. Linley, Junius C. Lewis, George C. Lock, Julia Lyon, James F. Laurimore, B. C. Lindsey, John S. Lockwood, Andrew J. Lovell, Eliza J. Lewis, Caroline Long, George W. Long, Mary Land-

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rum, William H. Lewis, Martha Ladow, J. J. Lusk, Mary Ladow, John S. Lovett, Emmeline Long, Chares McCaleb, Silas W. Mackey, James M. Mackey, Eliza Morey, Lydia Miller, J. M. Murray, George Miller, Christopher H. Miller, Frederick Meyer, Charles E. Morton, William H. Meyers, David McWilliams, Daniel Morgan, Sarah A. Morrison, Francis Marion, William Meriwether, Elizabeth J. Miller, William A. Myers, Elmer Miller, A. R. McCoun, Jemima Myers, Dillard P. Motley, James Musgrove, William Monroe, Nelson Morey, Samuel L. Morgan, Miner J. Matteson, Green Moore, William McIntyre, August Mashage, Harvey Miller, Stephen McDonald, William J. Mackey, James McWilliams, John J. McCune, Andrew J. Newlan, George W. Nowell, Northwestern Mutual Life Ins. Co., Clara Nickerson, Parmelia Nance, Fred Naxera, David O'Brien, Andrew P. O'Connor, Patrick Ormand, Daniel Orr, Henry D. Praul, Nina M. Packard, John Penn,
46 Theodore C. Poling, Edwin Pendleton, Mark Penick, Virginia M. Prince, William P. Pryor, Emma Pitzer, George P. Priestly, Edward C. Patterson, William W. Pierce, Sarah E. Parsons, Mary Pruesner, Newton J. Parker, Frank C. Priester, M.G. Patterson, Amanda M. Pennyfeather, George Pratt, Antino Roy, James Robertson, Garrett Rosencranz, Frederick Reich, Charles Robb, Charles W. Reed, Joseph Rowe, George F. Robinson, John O. Roberts, Sup't Schools of Calhoun County, Thomas J. Selby, Thomas J. Schultz, Alfred H. Smith, James W. Stark, William Schaffer, George F. Speckhart, Mary L. Smith, Tylee Shepherd, William Strickhorst, Emma P. Stanton, Margaret A. Skinner, Frank J. Stolte, Harlow M. Spencer, Sarah B. Selms, Seaman Sprague, James W. Sprigg, Charles Standhart, Robert J. Stillwell, Roscoe A. Sweet, J. S. Stark, Cyrus Stewart, Clarissa J. Scott, Abner Shinn, William Schultz, Lubbe H. Schmidt, Alice M. Smith, Lewis K. Smith, Anton J. Stolte, Charles T. Smith, Charles R. Shaw, Stephen G. Shaw, Mary J. Scott, E. M. Seely, Pulaski Shipman, Augustus Simpkins, Frank Strubinger, Benjamin Strauss, H. T. Shaw, Mary L. Strubinger, William A. Strubinger, Henry J. Strubinger, Sarah Strubinger, Tillie M. Strubinger, John O. Strubinger, Edwin F. Strubinger, Cora C. Strubinger, Mary E. Strubinger, Bert F. Strubinger, Roy Strubinger, George W. Schwartz, Henrietta Smith, Catherine Schleiker, James M. Shipman, Eugene Smith, Edward Sharpless, Peter O. Sharpless, Emma L. Schmidt, Margaret C. Schmidt, Albert J. Schmidt, Bertha A. Stobemack, John Sidwell, Florence A. Strong, F. L. Shriver, Marjory Sidwell, Susan L. Sibley, William Shively, Eliza J. Scott, John S. Scott, Joseph M. Thurman, James B. Thurman, George Tipler, James B. Thompson, Mary L. Thompson, Edward Turner, 2d. Samuel C. Thomas, Adm'r of S. F. Thomas, M.

H. D. Talbot, Mrs. E. H. Talbot, Asa Turner, Franklin Titsworth, Mary H. Turner, William Trauernicht, Warren S. Tibbitts, Mary Venable, Arthur Venable, Albert Venable, Alice Venable, William M. White, Charlotte Westlake, Charles S. Warner, Elizabeth J. Wells, Irwin D. Webster, Zephaniah T. Webster, George W. Wells, John H. Webster, W. R. Walston, Frederick Weidman, William Walden, Jacob Windmiller, Wilson Walker, Thomas Worthinton, Jr., Silas Wallace, LaFayette Woodruff, Augustus Wilkinson, Henry Wackenkamp, William Wilson, Eliza Wilson, Alexander D. Wilson, Joseph T. Whitney, John Walsch, George K. Wheelock, Stanley Wheelock, John A. Wilson, Anna S. Woods, Lucy P. Wiggan, Julia G. Wheelock, Sue M. Wagy, James A. Yingling, Henry F. Yokem, Francis L. Zerenburg, J. P. Zook and The Sny Island Levee Drainage District, have acquired title to the said lands, or some parts or portions thereof, in which they are now interested, as described in the said "Exhibit X," filed with this Supplemental Bill, since the 26th day of July, 1880, the date at which the petition for the organization of the Sny Island Levee Drainage District was filed with full notice of the contents of said petition, and the proceedings of the County Court of Pike County thereon and are bound by that proceeding, and the appropriation of the said levee and other works by the said Sny Island Levee Drainage District, to the protection of their lands from overflow, in like manner as if they had been petitioners therefor.

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And your orators would further show unto your Honors, that certain of the said defendants, to-wit: Eliza D. Anderson, Buddle H. Atkinson, Harry B. Atkinson, Charles E. Brewster, Anna M. Brewster, Minerva M. Brewster, Carson W. Brewster, Frank Beebe, Francis L. Cupp, Anna J. Dodge, Letitia Greene, Maria A. Grabill, Catherine Gunsett, George Gunsett, John T. Gunsett, Maria H. E. Gunsett, John Henry Gunsett, Mary Grammar, Julia Higbee, Harry Higbee, Sue W. Higbee, Mary Hosford, Hepsy J. Hosford, Hilbert Hosford, Everett S. Hull, Mary C. Hull, Nancy Hinds, Elizabeth Halsted, Phœbe J. Long, William J. Long, Henry A. Long, George P. Long, Caroline Long, Julia Lyon, Sarah Morris, Susanna McTucker, James McTucker, Jessie McTucker, Eliza McTucker, Mary McTucker, John B. McTucker, John Miller, Henry C. Miller, Folkalena M. Miller, William Miller, Mary Miller, Andrew Miller, Jr., Frederick Miller, Amalie Miller, Adam Miller, Mary Moore, Aurelia P. Nance, Susan F. Ramsey, Mary T. Ramsey, Melvina Ross, Charles H. Rankin, Fannie C. Stillwell, Richard H. Stillwell, Mary Stillwell, Harold Stillwell, Earl Stillwell, Lizzie Schultz, Mary E. Sapp, William F. Sapp, Mary A. Sapp, Emma Sapp, John E. Sapp, Jr., L. A. Sapp, Charles R. Sapp, Ber-

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Bill and Amendments Apr. 22, '89

tie E. Sapp, Edward A. Sapp, Alonzo C. Sapp. Mary A. Snyder, Irene Stebbins, Frank Stebbins, Elvira W. Shaw, Stephen G. Shaw, Abner Shinn, Mrs. Brison Stillwell, Peter R. Stedman, A. B. Stedman, Sophia B. Thomas, John S. Thomas, Jr., C. J. A. Thomas, Albert J. Thomas, W. S. Thomas, C. C. Thomas, George H. Tryon, Edward Tryon, Caroline Williamsmeier and Sarah H. Whittaker, are heirs at law of, and take title to, the lands in which they are now interested as set forth in said "Exhibit X," from ancestors who took part in some or all of the proceedings before mentioned, by which the said bonds were caused to be issued, the said assessments made, or the said levee or other works appropriated and used for the protection of the said lands from overflow, as aforesaid.

And your orators would further show unto your Honors, that certain of the said defendants, to-wit: Charles M. Alger, Richard H. Baker, William H. Beacon, Norman Brown, L. T. Brittingham, I. B. Brittingham, R. T. Bratten, W. D. Bratten, A. G. Coley, Daniel Coney, John H. Duker, Thodore Duker, Charles B. Dustin, J. T. Davis, Lizzie Davis, Henry F. Davis, O. J. Edmunds, John T. Emison, Hugh A. Emison, Samuel K. Floweree, John H. Franklin, William H. Fisher, Alice Fisher, William C. Foreman, John H. Garth, William H. Gay, Lewis Green, Samuel B. Gaines, Christopher D. Greene, William M. Hatch, William C. Hardin, Isaac A. Hoskins, James M. Henry, Emma D. Jones, Harvel Jordon, George M. James, Alexander C. James and Jesse H. Rector, Administrators of John D. James, deceased, Thomas King, George Kile, Jr., Alfred W. Lamb, Aaron R. Levering, Emmeline Long, Junius C. Lewis, I. N. Linley, Claus A. Luken, Catherine Y. Meredith, Silas W. Mackey, James L. Mackey, Sarah A. Morrison, John J. McCune, William Meriwether, William H. Myers, Elmer Miller, Christopher H. Miller, David M. Morris, Bernhard Miller, James Musgrove, Andrew J. Newlan,

49 James A. Nelson, Andrew P. O'Connor, Virginia M. Prince, Albert W. Pettibone, Jason Ransom, A. D. Rachael, James D. Rupert, Mary L. Smith, Amos J. Stillwell, William H. Spencer, Joel K. Scarborough, Henry J. Stolte, George W. Schwartz, William D. Shinn, Albion Shinn, Edward Sharpless, Peter O. Sharpless, Albert J. Schmidt, Andrew J. Settles, William Schaffer, Cyrus Stewart, Philo E. Thompson, William Tolbert, John T. Twiggs, William M. White and J. T. Zook, have acquired title to the lands in which they are now interested, as set forth in said "Exhibit X," by the acceptance of deeds of conveyance expressly recognizing the lien of your orators upon said

tracts of land for the amounts advanced by them for the construction of the said levee and other works. Original & Amend filed Apr.

And your Orators would show unto your Honors that each and every of the defendants to this, your Orators' Supplemental Bill, with full knowledge that the said levee and other works were constructed with the funds furnished by your Orators, and since the decree of this Honorable Court was rendered declaring a lien in favor of your Orators upon all the lands described in said "Exhibit A," filed with the Original Bill, for the payment of the sums of money found due them by said decree, and that no part of the amounts due your Orators, as aforesaid, had been paid to them, have, by the payment of assessments made upon their said lands by the said Sny Island Levee Drainage District, approved, adopted and ratified the acts of the said Sny Island Levee Drainage District in taking and appropriating the said levee and other works so constructed with the funds of your Orators, as aforesaid, to the protection of the lands of each of said defendants, and each of the said several defendants named herein now does appropriate the said levee and other works, and now does refuse to pay or contribute anything to the payment of the amounts so due to your Orators, as aforesaid.

And your Orators further show unto your Honors that the said Sny Island Levee Drainage District, by its officers, agents and servants have from year to year, and in every year since the organization of the said District, made large assessments of money upon each and every of the said tracts of land subject to the lien for the assessments made for the payment of the principal and interest of the bonds of your Orators and others, for the purpose, as the said defendants pretend, of raising money to pay the cost of the maintenance and repair of the said levee and other works, which said assessments the said defendants pretend are a lien on said lands paramount to the lien of your Orators' said assessments and bonds, and the said defendants, contriving and intending to defeat the just lien and rights of your Orators, have, by the agency and undue assertion of some right in the officers and agents of the said Sny Island Levee Drainage District, by certain pretended proceedings in some Court, or by some public officer, caused many of said tracts of land, subject to the lien of the assessments made for the payment of the bonds issued, as aforesaid, to be sold for the payment of the assessments made by said defendants through the said Sny Island Levee Drainage District, and have caused deeds or other evidences of such sales to be made; but your Orators charge that all such assessments and sales were merely color-

Bill Amendments '82,'83 able, and are fraudulent as against the rights of your Orators and other holders of the bonds before mentioned, and the purchases were for or in trust for said defendants, or the said Sny Island Levee Drainage District, and absolutely void as against the rights of your Orators or other holders of said bonds, and such assessment proceedings and sales are mere incumbrances and clouds upon the title to said lands, and were intended by the said defendants to, and do, hinder and embarass your Orators and other holders of said bonds in the enforcement of their rights.

And your Orators further show unto your Honors, that before the construction of the said levee and other works by the said Commissioners, appointed under the order of the County Court of Pike County, Illinois, the body of the lands embraced in the territories described in the Petition to the County Court of the said Pike County, Illinois, and which embraces all the several tracts upon which assessments were made for the repayment of money
51 to be applied to the acquisition of the right of way, and the construction of the said levee, and other works, was, and each of the tracts thereof was, swampy, wet, and subject to frequent overflow by the waters of the Mississippi River, and were of small value, not exceeding an average of fifty cents per acre, and the average assessment of about six dollars per acre on said lands, made to repay money borrowed to pay the cost of constructing said levee and other works for drainage and protection of said lands from overflow, greatly exceeded the then market value of said lands, but it was expected and promised by the land owners and the Commissioners, through and by the County Court of Pike County, that the construction of the said levee and other works, according to a plan and prospectus of the said levee and other works, prepared and published by the then owners of said lands, and by the said Commissioners, to influence persons to purchase the said bonds, that the completion of the said levee and other works, would, when constructed according to the said plan and prospectus, drain said lands and every tract of the same, and protect them from overflow, and render them healthy and productive, and so greatly enhance the said lands in value, as to make them ample and desirable security for the said assessments; and, relying upon the representations of the said land owners, made by said Commissioners, in their behalf and by their authority, and upon the plan and prospectus of the said levee and other works, prepared and made by the said Commissioners for and in behalf of said land holders the said Francis Palm, since deceased, and your Orators and other holders, were induced to purchase and pay for said bonds to said Commissioners who then applied the sums of money so

paid them for said bonds to the acquisition of the right of way and the construction of the said levee and other works, and expenses incidental thereto, and after said levee and other works were completed by the said land owners, acting by said Commissioners, the said lands were thereby drained and protected from overflow, and made healthy and profitable for cultivation, and enhanced in value to an average of twenty-five dollars per acre, and the assessments upon said lands and the said bonds,
52 so issued and sold by the said commissioners, became and were made thereby an adequate and desirable security for the money secured by the said bonds, with the accruing interest thereon, and if the said defendants, who were then and are now the owners of the said lands, and persons under whom the defendants, who are now, but were not then, the owners of the said lands, had, as it was at all times their duty to do, maintained, improved, as became necessary, and kept in repair the said levee and other works, they would have protected and drained said lands, and said lands would have improved in usefulness and value, and would have continued to be adequate and satisfactory security for the amount of said bonds, and the accumulations of interest thereon, but your orators charge the truth to be that the defendants, the present owners of said lands and the several tracts thereof, and the persons under whom they claim a present interest in said lands, have combined and confederated together not only to defeat the collection of the said assessments made upon their lands respectively for the payment of the said bonds, but have taken possession of the levee and other works into their own hands to the exclusion of the said commissioners, whose duty it was, under the order and decree of this court, made on the 13th day of March, 1879, to take, retain and hold the right of way, levee, and other works and property, and keep, take care of and preserve the same, under the order and control of this court for the benefit and on behalf of your orators and all other parties interested therein, or who might thereafter be found to be interested in the same, in whole or in part, and the said defendants, with full notice of the said decree of this honorable court, before mentioned, and the duties of the said commissioners thereunder, in pursuance of their said unlawful combination and confederacy, to the prejudice and injury of your orators and other holders of said bonds, caused said commissioners to surrender possession, care and control of the said levee and other works to them, and the said defendants themselves thereby undertook to retain and hold the said right of way, levee, and other works and property,
53 and keep, take care of, preserve and protect the same for the benefit of themselves, and for and on behalf of your Orators and all other persons interested therein, or who might in any way

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be interested therein, in whole or in part, and the defendants did, after they had taken the possession of the said levee and other works from the said Commissioners, and assumed the aforesaid duties in respect thereto, raise and expend some money and made divers and many alterations and pretended repairs and improvements upon the said levee and other works, but they made said alterations, improvements and repairs upon the said levee and other works so unskilfully, negligently and insufficiently, that the same has become insufficient for the drainage and protection of the said lands, as it would have otherwise been if the said defendants' had protected, preserved, improved and kept the same in good repair, as was their duty to do, whereby, and by reason of the neglect of their aforesaid duties by the said defendants, the said lands, and the several tracts thereof, have continued to be and again become wet, and subject to overflow, and injured and lessened in value, so that they are now a scarce and insufficient security for the amount of the assessments upon the same, with the accumulations of interest upon such assessments and bonds, and such lands, and each tract thereof, is, by reason of the premises, not only chargeable with the assessments so made as aforesaid, and with the interest thereon, but with such further assessments as may be necessary to pay the necessary cost of the repair and improvement of such levee and other works, as may be required to keep the security of your Orators and other holders of said bonds, ample and sufficient, and to keep down the taxes that may become due on the several tracts of land, unless the same is paid by the owners thereof; such further assessments to be made and collected under the orders of this Honorable Court,—all of which actings and doings of the said defendants are contrary to equity and good conscience, and forasmuch as your Orators are remediless at law, they pray the intervention of this Honorable Court.

And may it please your Honors to grant unto your Orators
54 writs of subpœna, directed, etc., commanding the said defendants to be and appear before your Honors in this Honorable Court on a certain day, therein to be fixed, then and there to answer, all and singular, the allegations and charges in this your Orators' Bill of Complaint contained, fully, distinctly and unevasively, without oath, their oath being hereby expressly waived.

And may it please your Honors also to grant unto your Orators the gracious writ of injunction restraining and forbidding said defendants and each of them as hereinafter prayed; and on the hearing hereof may it please your Honors to find, order, adjudge and decree that your Orators and the holders of the bonds and the interest coupons, issued as set forth in this, Your Orators' Bill, are entitled to a first and prior lien upon all the assessments made upon

the several tracts of land in said bill described, under the proceedings and orders of the County Court of Pike County in the State of Illinois, and upon the several tracts of land in the pleadings and exhibits set forth, for the satisfaction and payment of the whole amount of money mentioned in said bonds and interest coupons, and the lawful interest upon the amount of said bonds and coupons that have matured and are now overdue and unpaid, and for the lawful costs and charges about this, their suit, in that behalf expended, etc. Original & Amended filed Apr.

That the said defendants and the persons under whom they claim any or all the lands in the said Complainants' bill, and the exhibits filed therewith, had full and ample notice of the rights of your Orators and other holders of said bonds and coupons in the said bill mentioned, and that all other persons dealing in said lands had like full and ample notice, and all deeds, mortgages, assessments and sales and other transactions of, in or relating to said lands or any of them, are, as against your Orators and other holders of said bonds and coupons issued and sold as in said bill set forth, absolutely null and void.

That the said defendants are, by reason of the matters and
55 things set forth in the said complainants' bill, bound to preserve and protect, improve and repair the said levee and other works in the said bill and exhibits described, by sufficient contribution in money, ratable or otherwise, by further assessments upon said lands, in order to protect and keep the security of the complainants adequate and sufficient, and that by the appointment of a Receiver or Receivers, with ample powers, or other appropriate order and decree, your Honors would compel the said defendants to preserve, protect, repair, improve and make said levee and other works protective of said lands for the benefit of your Orators and others interested therein, or to give and confer upon such Receiver the power to make needful assessments upon said lands in proportion to benefits and the relative value of each tract thereof, and with the money arising therefrom, or by the mortgage of such assessments and the lands upon which they are made, raise the money necessary for the repair and improvement of the said levee and other works, and with the money so raised proceed to repair and improve said levee until it is made adequate for the drainage and protection of all of the said lands; that each and every of said defendants herein may be enjoined by this Honorable Court from selling, transferring or assigning the title to said lands owned by them, or any part thereof, upon which any of said assessments may rest, except subject to the lien of said assessments, as the same shall be determined by this

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Honorable Court, or in any manner whatsoever changing, altering or affecting the title thereto, so, as to in anywise, impair, diminish, hinder or prejudice the lien of said assessment thereon, or on any portion thereof, and that the Sny Island Levee Drainage District, its officers and agents, be enjoined from selling or offering for sale any lands covered by any of the assessments herein in question, for any pretended assessments or alleged liens by said District attempted to be assessed, except subject to the lien of all assessments and liability on said lands respectively, as the same shall be determined by this Honorable Court.

And may it please your Honors to order, determine and declare
56 the amounts due to your orators, and all other holders of said bonds and coupons who will come in and contribute to the expenses of this suit, according to the rules and practice of this Honorable Court. and the amount due for principal and interest on the several assessments made against and upon each tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon each tract of land necessary to the payment of the amount of the principal and interest now due upon the bonds and coupons of your orators and others who may come into the cause and contribute as before mentioned, and that each of the said tracts of land, so sold under the order and decree of this court for the amount chargeable upon and against the same, unless the owner of the same, or some other person for him, shall, within a day limited, pay said amount, with a just proportion of the costs of this suit.

And may it please your Honors to appoint one or more commissioners or receivers in the place and stead of the said John G. Wheelock and George W. Jones, or to appoint a commissioner in the place of the said Benjamin F. Westlake, deceased, and if one or more commissioners, or a receiver or receivers are appointed in the place and stead of the said John G. Wheelock and George W. Jones, the said Wheelock and Jones may be ordered and directed to turn over and deliver to such commissioners or receivers so appointed, all books, papers, documents and property now in their possession or under their control.

And may it please your Honors to grant unto your orators such other and further relief as the case may require and to equity belong, etc.

JOHN M. & JOHN MAYO PALMER,
Solicitors for Complainants.

HENRY M. DUFFIELD,
Of Counsel.

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS. Original & Amended Apt.

Michael W. O'Brien, et al., Complainants,
vs.
John G. Wheelock, et. al., Defendants.
} Sny Levee District Bond Case.

AMENDMENTS TO BILL OF COMPLAINT.

57 1st Amendment.

After the words "April 24th, 1871," in the 27th line of page 29, insert:

"And your orators would further show unto your Honor, that long before and at the time of the passage of the act of April 24th, 1871, entitled 'An act to provide for the construction and protection of drains, ditches, levees and other works,' which took effect and was in force July 1st, 1871, the several tracts of land described in Exhibit A of the original bill, and which together composed and constituted the body of lands commencing near the mouth of Fall Creek in Adams County, and extending south of a varying width, of from three to five miles for a distance exceeding fifty miles, and bounded on the west by the Mississippi River, and on the east by the bluffs or the high water mark of that river, including the greater part of several congressional townships, and containing more than one hundred thousand acres, which if reclaimed and protected from a periodical overflow of the waters of the Mississippi River, would be fertile and healthy and from its proximity to the Mississippi River, and to the City of Quincy, a few miles to the north, and to the growing cities of Hannibal, Louisana and Clarksville, and to the highly improved lands in the neighboring regions of Illinois and Missouri, had attracted great and unusual degree of attention from persons seeking homes, and speculative investments, and though at the time of the passage of the Act of April 24th, 1871, the said lands were of very small market value, and were sparsely populated, many persons re-
58 siding upon the higher lands in the counties of Adams, Pike and Calhoun and in the cities of Hannibal, Louisiana and Clarksville in Missouri had bought large bodies of said lands with the expectation that the same would be reclaimed and protected by levees and other works, from the overflow of the Mississippi river, and by that means be made salubrious and productive and greatly

Bill ments 22 '89 increased in value, so that before the passage of the Act of April 24th, 1871, the subject of the reclamation and protection of said lands had for many years been the subject of consideration and discussion amongst the owners and occupants of the same, as well as others who knew the condition of said lands and their prospective value, and several attempts had been made before that time for the construction of levees to reclaim and protect said land, but all such attempts had failed, so that before the passage of said Act of April 24th, 1871, it was substantially understood by all the owners and occupants of said lands, and others interested therein, that in order to the reclamation and protection of said lands it was absolutely necessary that the passage of a Law by the General Assembly of the State of Illinois should be obtained by virtue and under the provisions of which the owners and occupants and others interested in said lands, should be united and organized and a common agency created, with authority to make all necessary plans, estimates and contracts for the location and construction of a levee, or levees, or other works necessary for the reclamation of said lands, and their protection from the overflow of the waters of the Mississippi river, and to borrow money by the issue of bonds or otherwise, to be secured and paid by assessments or pledges of the lands benefited to pay the cost of such levees and other works.

And your orators would further show to your honors that during the session of the General Assembly of Illinois in 1870 and 1871 defendant Charles N. Clark, with money advanced to him for the payment of this expenses by Noah Rouse, —— Ferguson, Robert Rouse, Henry Morris, M. M. Aldrich, Dennis Green, John Aaron, J. Coffin, F. Wheeler, —— Williams, Evan Heffner, —— Wilson, H. Orr, R. Rankin, —— Boker, D. Bradshaw and J. Range, and with the knowledge and approval of all the then known occupants and owners of said lands undertook to obtain, and did obtain from the General Assembly of the State of Illinois the passage of the Act of April 24th, 1871, which the said owners and occupants of said lands expected and believed would effect the common object they had in view, which was the reclamation and protection of said lands.

And your orators would further show unto your Honor, that immediately after said Act took effect, the owners and occupants of said lands described in said "Exhibit A" proceeded at once to avail themselves of the provisions of said Act, and for the information of all interested caused it to be published at length, or in its substantial parts, in the Hannibal Courier, and Pike County Democrat, and in other newspapers published and circulating in the

cities of Quincy, Hannibal, Louisiana, Clarksville and Pittsfield which had a large and general circulation among the then owners and occupants of said lands, so that persons interested therein were by that means fully informed of the passage of the Act before mentioned, and of all its provisions, and the said defendant Charles N. Clark, who owned a large amount of said lands, and others interested therein, called and extensively advertised public meetings of those interested in saids lands, to be held at a number of prominent points in the District intended to be reclaimed and protected or in the immediate neighborhood thereof, and at such meetings which were largely attended the said Clark and others interested, read to and in the hearing of the persons assembled the "Act of April 24th, 1871" at length, and explained to them its provisions, and the said Act was approved and accepted by all the owners and occupants of said lands and by the means aforesaid and by publication in the aforesaid newspapers, the provisions of the Act aforesaid became generally known, and the owners and occupants of said lands devised a plan for the organization thereunder of an Incorporation to be composed of the owners, occupants and others interested in said lands with a capital stock of two hundred thousand dollars ($200,000) to raise money to put the said Act of April 24th, 1871, into effect for the purpose for which its passage was by them procured. And your orators charge that by reason of the publication of said Act in the newspapers before mentioned, and of the efforts of said Clark and others, and of the public meetings held, and of the published reports of the proceedings of said meetings which appeared in all, or most of the newspapers before mentioned, all of the owners and occupants of said lands and persons interested in them were fully informed of the passage of said Act and of the steps taken under its provisions for the reclamation and protection of said lands.

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And your orators would further show to your Honor. that in furtherance of the plan adopted by the occupants and owners of said lands, S. M. Spencer, Noah Rouse, John Aaron, Robert Rankin, Joseph Elliot, Josiah Thompson, J. K. Scarborough, D. Robbins, John G. Wheelock, E. K. Fisher, Southard & Walker, H. C. Whitney, John Morris (who has since died), Joshua Mitchell, David R. Burkholder, The Hannibal Ferry Co., David L. L. Hafner, L. A. Saunders, Dennis Green, D. T. Smiley, Henry Edwards, Cyrus Beezley, Henry Koker, Francis Doughty, W. A. Gordon, Pat Griffith, Wl Chandler, P. A. Journey, J. R. Reed. Wm. Nees, E. C. Bridge, S. W. Martin, R. B. Stedman, John A. Wilson, James W. Sperry, Chamberlain & McTucker, Henry Orr, C. T. Brewster (since deceased), Harrison Brown, M. D. Massie, P. H. Davis

Bill ments 22,'89 (since deceased), Henry Howard, Joseph Jean, H. Palmer, Cyrenius Gard, and L. C. Hosford (the three last since deceased), George McFarland, Philander Shipman, Benjamin Saxbury, James R. Campbell, Joseph M. Tolbert, James H. Tolbert, Thomas O. Tolbert, Wm. Garner, (since deceased), F. J. Jackson, Hobart S. Horton, John W. Hamill, H. J. Noyes, Elijah Petty, Charles E. Dustin, Shaw & Rupert (partners), W. M. Haines, E. C. Tryon, Samuel Taylor, John E. Sapp, J. G. Adams, Francis Marion, Horance M. Smith, Sarah Sapp, Perry Well, Thos. Owsley, Jesse Long, S. S. Thomas, J. A. Thomas, (since deceased), Wm. Yoken, John Ward, C. M. Brammell, J. D. Gorton, Moses Morey, (since deceased), C. E. Mason, H. W. Morris, G. Bookout, D. Devol, Joseph C. Colvin, B. Stillwell, C. N. Clark, John J. Smiley, Wm. Dustin, Moses Waggoner (since deceased), Wm. G. Smith, N. M. Aldrich, Thomas Whitworth and William Hicks all of whom were at the time owners of said lands and those of who are living and the heirs and devisees of those of them who are dead are defendants to this bill, organized and subscribed to the Capital Stock of a corporation, the express object of which was to raise money
61 to defray the expenses necessary to put said Act into operation, for the reclamation and protection of said lands, as will appear by the list of subscribers, and the Articles of Association of said Incorporation, to copies of which, when proved and made part of the evidence herein, your orators pray leave to refer."

2nd Amendment:

On page 30, after the words "William Yoken," in line 23, insert: Amos J. Stillwell, deceased, whose heirs at law are the defendants Fannie C. Stillwell, widow, Richard H. Stillwell, Mary Stillwell, Harold Stillwell, Earl Stillwell, John W. Brammell, Charles T. Brewster, deceased, whose heirs are Anna M. Brewster, Minerva M. Brewster and Carson W. Brewster, Minerva Ross, widow, Hobert S. Horton, Octavia L. Horton, David Hull, whose widow is Sarah R. Whitaker, L. G. Hosford whose widow and heirs are Mary Hosford, (widow) Hepsey J. Hosford, Hilbert Hosford, Mary Hosford, 2nd, Francis J. Jackson, C. H. Rankin, Robert Rankin, whose heir is Henry R. Ramsey, whose widow and heirs at law are Susan F. Ramsey (now deceased) John R. Reed, Charles R. Shaw, whose widow and heirs at law are Elvira W. Shaw, Stephen J. G. Shaw, John E. Sapp, whose widow and heirs at law are Mary E. Sapp, widow, William F. Sapp, Mary A. Sapp, Emma A. Sapp, John E. Sapp, L. A. Sapp, Charles R. Sapp, Bertie E. Sapp, E. C. Tryon, whose heirs at law are George H. and Edward Tryon, heir of John A. Thomas whose widow and heirs are Sophia B.

Thomas, (widow) J. S. Thomas, Jr., C. J. A. Thomas, Albert Thomas, W. C. Thomas, C. C. Thomas, John A. Thomas, Lizzie Shultz, Mary Moore, William A. Chandler, John McTucker, whose heirs are Susanna McTucker, James McTucker Anna J. McTucker (now Dodge) Jessie McTucker, Eliza McTucker, Mary McTucker, John B. McTucker, William Wilson. Original & Amended filed Apr.

3rd Amendment:

On page 31 after the words "William McIntosh," in line 15, insert:

"Albert L. Allen, Charles T. Brewster, whose widow and heirs at law are hereinbefore named, Thomas J. Davis, James S. Irwin, Kennedy Long, whose widow and heirs at law are
62 Phoebe J. Long, widow, William J. Long, Henry A. Long, George P. Long; Robert Rankin, whose heir is C. H. Rankin; Perry Wells, Frederick Keiser.

4th Amendment:

On page 32 after the words "William R. Wills," in line 26, insert:

"Samuel M. Spencer, Thomas H. Branham, heirs of John McTucker, Anna J. McTucker, John E. Sapp, Thomas Cochran, Samuel Thompson.

5th Amendment:

On page 48 of the bill after the words "J. T. Zook," in the 8th line of said page, insert the words A. J. Davis and William M. Davis.

JOHN M. and JOHN MAYO PALMER,
Solicitors for Complainant.

HENRY M. DUFFIELD,
of Counsel.

[Indorsed]: Filed April 22nd, 1889.

JAMES T. JONES,
Clerk.

Then afterwards, to-wit: on June 3rd, 1889, July 30, 1889, and on August 31, 1889, came certain defendants and filed their several demurrers to the original bill herein, which demurrers are as follows, to wit:

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS, } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES,

June Term, A. D. 1889.

Michael W. O'Brien et al., executors, &c., Complainants,
vs.
John G. Wheelock, et al., Defendants. } In Chancery.

63 Demurrer of Edward H. Buckley, one of the defendants, to the Bill of Complaint of Michael W. O'Brien et al., executors of Francis Palms, deceased, the above named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and, for cause of demurrer, showeth that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for, from or against this defendant, and that the said complainants' claims in manner and form as in said bill of complaint set forth are stale and barred in equity.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

E. H. BUCKLEY.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

E. H. BUCKLEY.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF ILLINOIS, ADAMS COUNTY. } ss.

Demurrer Edward H. Buckley, June 3, 1889.

Edward H. Buckley, being first duly sworn according to law, on his oath deposes and says that he is the defendant Edward H. Buckley, named as a defendant in the cause above entitled, and that the above and foregoing demurrer is not interposed for delay.

EDWARD H. BUCKLEY.

Subscribed and sworn to by the said Edward H. Buckley, before me, at my office in said county, on this first day of June, A. D. 1889.

SAMUEL WOODS,
Notary Public.

[Indorsed]: Filed June 3rd, 1889.

JAMES T. JONES,
Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF THE STATE OF ILLINOIS.

June Term, A. D. 1889.

Michael W. O'Brien, Francis Palms and Clothilde Palms, Exrs., and Albert Blair,
vs.
64 John G. Wheelock, et al. } In Chancery.

Demurrer of Chas. E. Morton and others, filed July 3, 1889.

The Demurrer of Charles E. Morton, Jacob Turnbaugh, Adeline Turnbaugh, Perry Wells, Mary R. Collins, T. P. Johnson, Mahala R. Waggoner, John Sidwell, Anthony Roy, Lucinda Newman, Harriet Manker, William Oakley, James M. Ruyle, John McLain, William McLain, Mile M. Blake, Clark F. Levett, William P. Levett, John S. Levett, Elizabeth Jackson, Eliza Jackson, William Henry, Charles Jennings, Samuel Bunn, Fred Wiedman, Joseph M. Allen, Harrison Martin, Thomas Rodhouse, Alexander Hemphill, Aaron F. Hemphill, Lucinda B. De Camp, William M. De Camp, James E. De Camp, George M. De Camp, Adelia De Camp, Adeline De Camp, Esther De Camp, Tata De Camp, John Jennings, John H. Webster, Augustus L. Galloway, Charles W. Fleak, Charles Daniels, P. F. Barton, Charles McCaleb, John F. Berry, James R. Berry, A. F. Ferguson, Smith S. Thomas, Sophia B.

Thomas, John S. Thomas, Albert J. Thomas, W. S. Thomas, C. J. A. Thomas, C. C. Thomas, Elizabeth Schultz, Mary Moore, Thomas J. Schultz, Irwin D. Webster, Elizabeth Griffin, Z. T. Webster, W. E. Bybee, Mary J. Venable, Arthur Venable, Albert Venable, Alice Venable, Majorie Sidwell, Sarah A. Voshall, Ruth A. Bryant (Voshall), John T. Voshall, Mary J. Shelby (Voshall), Margaret N. Voshall, Alanson Moshier, John B. Harle, Mary Hosford, Milbert Hosford, Hepsy J. Hosford, Mary Crews, John Henry, George Henry, Alice Jennings, Warren S. Tibbitts, Robert T. Bratten, Edward T. Bridge, W. Douglas Bratten, James Hornback, Sarah E. Hornback, Wiley A. Farmer, Edward B. Ferguson, Samuel Clark, W. A. Kendall, Charlotte Westlake, Daniel C. Bates, Marcia A. Hunter, Clinton M. Dodge, Rebecca Praul, Henry D. Praul, Anna Praul, Emma Praul, Ida M. Praul, George T. Praul, Randolph L. Praul, John Praul, Adolphus Praul, Andrew J. Lovell, M. B. Steadman, Peter R. Steadman, A. B. Steadman, Mary E. Collins, Moses De Camp, Mary E. Griffin, Edward Prince and Virginia M. Prince, Defendants to the Original Bill, Supplemental Bill and Bill of Review of Francis Palms, et al.

These defendants by protestation not confessing or acknowledging all or any of the matters or things in the said original bill, supplemental bill or bill of review contained to be true in manner and form as the same are therein and thereby set forth and alleged demur to said Original Bill, Supplemental Bill and Bill of Review and to all of the matters and things therein contained; and for cause of demurrer show, that the Complainants have not in and by said Bills or either of them made out or stated such a case as entitles them to any relief in a Court of Equity; and have not therein stated sufficient cause to show that they have or are entitled to any relief against these defendants or either of them or against the lands and premises described in said Bills. Wherefore and for divers other good causes of demurrer appearing in the said Original Bill, Supplemental Bill and Bill of Review these defendants and each of them demur to the said Original Bill, Supplemental Bill and Bill of Review and to all of the matters and things therein contained and pray the judgment of this Court whether they shall be compelled to make any further or other answer to said Original and Supplemental Bill and Bill of Review and pray to be dismissed with their reasonable costs in this behalf sustained.

ORR & CRAWFORD,
Sol'rs. for above named Defendants.

Demurrer Charles E. Morton and others, filed July 30, 1889.

We certify that, in our opinion, the foregoing demurrer of Daniel C. Bates and others, defendants to the Bill of Complaint of Michael O'Brien et al. Exrs. et al. Complainants, is well founded in law, and proper to be filed in the above entitled cause.

ORR & CRAWFORD,
Sol'rs.

STATE OF ILLINOIS, }
COUNTY OF PIKE, } ss.

Daniel C. Bates, one of the above defendants, for himself and for all of his co-defendants, on oath, states that he has heard read the foregoing demurrer to the Original Bill, Supplemental Bill and Bill of Review of Michael O'Brien et al. Exrs., et al. in this suit; and that the same is not interposed for the purpose of delaying said suit, or any proceedings therein.

DANIEL C. BATES.

Subscribed and sworn to by Daniel C. Bates, before me, this 29th day of July, A. D. 1889.

A. G. CRAWFORD.
Notary Public.

[Indorsed]: Filed July 30, 1889.

JAMES T. JONES.
Clerk.

rrer of
go &
Railroad
filed Aug.
31, 1889.

IN THE CIRCUIT COURT OF THE UNITED STATES.

73 June Term, A. D. 1889.

John G. Wheelock and others,
ats.
Wm. O'Brien, F. F. Palms and Clothilde Palms, Executors and others,

IN CHANCERY.

The separate demurrer of the Chicago & Alton Railroad Company and each of them, defendants to the Bill of Complaint of said William O'Brien, F. F. Palms and Clothilde Palms, executors, and others.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said Bill of Complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer, shows:

1st. That there is no equity on the face of said bill of complaint, or the allegation of facts contained therein, entitling the complainants, or any of them, to the relief prayed in said bill or to any relief whatever against this defendant.

2nd. That the said bill shows upon the face thereof that the complainants and each of them, and the several parties from whom the complainants derived their alleged rights in the bonds described in said bill, were so far negligent in pressing and enforcing their said alleged rights, and suffered so long a period of time to elapse in prosecuting their said alleged rights, that the same have become stale and not enforcible in equity against this defen-
74 dant.

3rd. That the complainants, and the parties from whom they derived their alleged rights in said bonds, were guilty of such laches in the prosecution of said alleged rights, that during the long period which elapsed while the complainants remained idle and quiescent, the rights and interests of many outside persons as parties arose and intervened, as shown by the said bill itself so that the said complainants are now estopped to assert their said alleged rights in the premises against this defendant.

4th. That the allegations of fact in said bill of complaint contained, do not raise any implied promise on the part of said de-

fendant, nor any equitable obligation on his part, to pay the said bonds or any sum or sums of money whatever.

Demurrer Chicago & Railroad filed Aug

5th. That the alleged facts contained in said bill do not entitle the complainants, or any of them, to any lien or charge upon the lands of this defendant referred to in said bill, or any part thereof.

6th. That the complainant's remedy, if they have any, is at law, and not in equity.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill, and to all the matters and things therein contained, and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be dismissed with his costs according to the practice of this Honorable Court.

M. HAY,
H. S. GREENE,
J. O. HUMPHRY,
Counsel.

HAY, GREENE & HUMPHRY,
Solicitors for said Defendant.

STATE OF ILLINOIS, } ss.
COUNTY. }

Before me, a Notary Public in and for the County and State aforesaid, on this day of A. D. 1889, personally appeared

75 who, being by me duly sworn, depose and say that they and each of them are defendants in the above entitled cause, and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me this day of A. D. 1889.

Notary Public.

We, Milton Hay, Henry S. Greene and J. O. Humphry, do hereby certify that we are Counsel for the defendants named in the above demurrer and that in our opinion the said demurrer is well founded in point of law as to each of said defendants.

M. HAY,
H. S. GREENE,
J. O. HUMPHRY.

[Endorsed]: Filed August 31st, 1889.

JAMES T. JONES,
Clerk.

And afterwards, to-wit, on the 23d day of April, in the January
91 Term of said court, in the year of our Lord one thousand eight hundred and ninety, the following proceedings were had in said court, in said cause and entered of record, to-wit:

Michael W. O'Brien et al.
Executors &c.,
vs.
John G. Wheelock, et al. } In Chancery.

ng of rrers to Bill. This day this cause came on to be heard upon the demurrers of defendant to the bill of complaint herein, and after a partial and further argument is postponed until to-morow morning.

Then, afterwards, to-wit, on the 24th day of April, in the January term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to-wit:

Michael W. O'Brien et al.,
Executors, &c.,
vs.
John G. Wheelock, et al. } In Chancery.

This day come again the parties by their solicitors, and the court having heard the remainder of the argument of counsel takes the same under advisement.

Afterwards, to-wit, on the 25th day of April, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to-wit:

Michael W. O'Brien et al.,
Executors, &c.,
vs.
John G. Wheelock et al. } In Chancery.

overrul- murrers to ing ruling 92 This day come again the parties by their solicitors and the court being now sufficiently advised doth overrule the demurrers of defendants to the bill of complaint herein, and doth order that the defendants answer said bill of complaint in ninety days from to-day.

Answer of defendants presented by Orr & Cra filed Oct.

In the Circuit Court of the United States, Southern District of Illinois.

June Term, A. D. 1889.

John G. Wheelock, et al.
ats.
Francis F. Palms, et al. } In Chancery.

95

The answer of

1. Chas. E. Morton,
2. Perry Wells,
3. Mahala R. Waggoner,
4. Lucinda Newman,
5. James M. Ruyle,
6. Mile M. Blake,
7. John S. Lovett,
8. William Henry,
9. Fred Wiedman,
10. Thomas Rodhouse,
11. Lucinda B. DeCamp,
12. George M. DeCamp,
13. Esther DeCamp,
14. John H. Webster,
15. Charles Daniels,
16. John F. Berry,
17. Smith S. Thomas,
18. Albert J. Thomas,
19. C. C. Thomas,
20. Thomas J. Schultz,
21. Z. T. Webster,
22. Arthur Venable,
23. Marjorie Sidwell,
24. Jacob Turnbaugh,
25. Mary R. Collins,
26. John Sidwell,
27. Harriet Manker,
28. John McLain,
29. Clark F. Lovett,
30. Elizabeth Jackson,
31. Chas. Jennings,
32. Joseph M. Allen,
33. Alexander Hemphill,
34. William M. DeCamp,
35. Adelia DeCamp,
36. Tata DeCamp,
37. Aug. L. Galloway,
38. P. F. Barton,

96

39. James R. Berry,
40. Sophia B. Thomas,
41. W. S. Thomas,
42. Elizabeth Schultz,
43. Irwin D. Webster,
44. W. E. Bybee,
45. Albert Venable,
46. Sarah A. Voshall,
47. Adeline Turnbaugh,
48. T. P. Johnson,
49. Anthony Roy,
50. William Oakley,
51. William McLain,
52. William P. Lovett,
53. Eliza Jackson,
54. Samuel Bunn,
55. Harrison Martin,
56. Aaron F. Hemphill,
57. James E DeCamp,
58. Adeline DeCamp,
59. John Jennings,
60. Charles W. Fleak,
61. Charles McCaleb,
62. A. F. Ferguson,
63. John S. Thomas,
64. C. J. A. Thomas,
65. Mary Moore,
66. Elizabeth Griffin,

of 113 ants rep- by Orr ford. ec. 20, 1890

67. Mary J. Venable,
68. Alice Venable,
69. Ruth A. Bryant, (Voshall)
70. John F. Voshall,
71. Hanson Mosier,
72. Hilbert Horsford,
73. John Henry,
74. Warren S. Tibbetts,
75. W. Douglas Bralten,
76. Wiley A. Farmer,
77. W. A. Kendall,
78. Marcia A. Hunter,
79. Henry D. Praul,
80. Ida M. Praul,
81. John Praul,
82. M. B. Steadman,
83. Mary E. Collins,
84. Mary J. Shelby, (Voshall)
85. John B. Harle,
86. Hepsy J. Horsford,
87. George Henry,
88. Robert T. Bralten,
89. James Hornback,
90. Edward B. Furguson,
91. Charlotte Westlake,
92. Clinton M. Dodge,
93. Anna Praul,
94. George T. Praul,
95. Adolphus Praul,
96. Peter R. Steadman,
97. Moses DeCamp,
98. Margaret W. Voshall,
99. Mary Horsford,
100. Mary Crews,
101. Alice Jonnings,
102. Edward F. Bridge,
103. Sarah E. Hornback,
104. Samuel Clark,
105. Daniel C. Bates,
106. Rebecca Praul,
107. Emma Praul,
108. Randolph L. Praul,
109. Andrew J. Lovell,
110. A. B. Steadman,
111. Mary E. Griffin,
112. Edward Prince,
113. Virginia M. Prince.

These defendants, now, and at all times hereafter, saving and
97 reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as these defendants are advised it is or are material or necessary for them to make answer unto, answering, says that they admit that a pretended bill was exhibited on the 4th day of May, 1878 by Francis
98 Palms.

But these defendants aver that said pretended bill should not be considered as a part of a certain bill filed at the June Term, A. D, 1889, herein being designated by orators original bill in the nature of a supplemental bill and bill of revivor.

These defendants neither deny or admit that on the 13th day of March, 1879, that the said Francis Palms obtained lief to amend his said bill.

These defendants are not fully advised as to the ownership of said lands described in "Exhibit A," on and before April 24th, 1871.

Answer of defendant presented & Crawfor filed Oct.

These defendants deny and say that said lands mentioned in said "Exhibit A" and referred to in said supplemental bill were not low and nearly level, not below high water mark of said river, and not without protection from said overflow, and that said lands were not wet and marshy, and unhealthy, not in a dangerous conditon or unfit for cultivation.

These defendants aver that said lands described in Exhibit A and referred in said supplemental bill, that on and before April 24th, 1871, exceeded the value of fifty cents per acre and that
99 said lands were, on said 24th day of April, 1871, and before, worth twenty dollars per acre.

These defendants deny and say that the parties interested in said lands never did attempt to agree upon a plan to raise means to construct a levee or ditches, prior to the 24th day of April, 1871, or at any other time before that or since.

These defendants deny and say, each for himself and herself that they did not cause or procure the passage by the General Assembly of the State of Illinois on the 24th day of April, 1871, of a void act entitled, "An act to provide for the construction and protection of drains and ditches, levees and other works."

These defendants deny and say that they did not, or any one of them, file a petition under said void act in the County Court of Pike Co., State of Illinois in the August Term, A. D. 1871.

These defendants deny and say in the County Court for the County of Pike in the month of August, A. D. 1871, did not have jurisdiction of the subject matter contained in said petition, mentioned in said Supplemental Bill as having been filed in August, 1871.

These defendants deny and say that the greater portion of said
100 lands were not inundated nearly every year but aver that there were many years that said lands were dry and not overflowed so as to prevent the raising of crops on the same.

These defendants deny and say that the overflow of said Mississippi river never did extend from bluff to bluff.

These defendants deny and say that said petitioners did not give due and legal notice of the presentation of said petition to said County Court.

These defendants aver that the pretended proceedings of said court mentioned on page twelve of said Supplemental Bill were ab-

er of 113 adants rep- ted by Orr wford, Oct. 20, 1890.

solutely null and void and that complainants were bound to take notice that said act was unconstitutional.

These defendants aver that said commissioners, mentioned in said Supplemental Bill were acting at the time stated therein, without authority of law.

These defendants aver that the jury mentioned in said Supplemental Bill acted without legal authority and that their pretended assessment of damages and benefits, as appeared by said "Ex-
101 hibit A" attached to said original Bill herein, was and is null and void.

These defendants deny and aver that said assessment did not then become a lien upon said lands and also deny and say that said commissioners did not acquire the legal title of lands for the cite of said levee.

These defendants deny and say, that said commissioners did not borrow any money whatever upon the bonds issued by them.

These defendants deny and say that said commissioners did not sell said bonds.

These defendants deny and say, that the commissioners did not rely on the acts of the General Assembly and did not confide in the integrity and justice of the said landowners and the said commissioners did not receive any money from said Francis Palms on account of said bonds and the said commissioners did not use any money, received from said bonds, in the construction of said levee.

These defendants deny and say, that said Francis Palms did not pay for any of said bonds, the par value of the same, but bought said bonds from the contractors to build said levee, at a great
102 discount, to-wit, 25 per cent.

These defendants deny and say, that they did not sell any of said bonds to said Francis Palms and did not sell any of said bonds to any or either of said complainants.

These defendants deny and say, that the pretended levee mentioned in said Supplemental Bill on page fourteen and line nine, did not protect said lands from overflow from Mississippi river.

And that said lands were not reclaimed and rendered healthy and productive and were not benefited to an amount greatly in excess of the sums assessed against them.

These defendants aver that said lands were not benefited and

that the value of said lands were not increased by the building of said pretended levee, if any was built.

Answer of defendants presented & Crawford filed Oct

These defendants deny and say, that the said Palms did not advance money to said commissioners and that said other complainants did not advance any money to said commissioners.

These defendants deny and say, that they did not procure the
103 passage of said act or either of said acts mentioned in said Supplemental Bill.

These defendants admit that the Supreme Court of the State of Illinois held that the pretended act or acts mentioned in said Supplemental Bill were void and of non-effect.

These defendants deny and say that said pretended levee never did protect the lands or any of the lands of these defendants from overflow from the Mississippi river and these defendants further aver that by reason of closing up the mouth of the Sny Carte by said pretended levee caused back water and the rain fall to so spread out over these defendants' lands as to greatly depreciate their value, so that these defendants' lands were of less value after the said levee was built than they were before.

These defendants deny and say that after said decision of the Supreme Court of the State of Illinois, mentioned in said Supplemental Bill, did not request the said commissioners to take, retain or keep possession of said pretended levee and did not request said commissioners to keep the same in repair and did not provide
104 a fund by conveying to said commissioners Thirty Thousand acres or one acre or any number of acres of said land.

These defendants aver that at the time said decision was rendered at said Supreme Court, that there was a great space, a space of great length washed out of said pretended levee and that that gap remained in said levee for a long period of time, to-wit, four years.

These defendants aver that their lands would have been more valuable if said gap in said levee never had been filled up.

These defendants aver that there is no legal and valid lien against their said lands.

These defendants do not admit any of the allegations contained in the answer filed on the 13th day of March, 1879, but deny each and every allegation contained in said answer.

These defendants deny and say that said commissioners did not issue and sell said bonds as charged in the Original Bill.

These defendants deny and say that the money arising from said bonds, if any was not used in the construction of said levee standing on said premises.

These defendants deny and say that said commissioners never did accept said levee as a complete levee, never did deem said pretended levee sufficient in height and strength to protect said lands from overflow.

105

These defendants aver that a levee along the line where the pretended levee mentioned in this bill is now situate, would not and could not protect the land of these defendants because such embankment would simply dam the water and cause it to stand upon the land of these defendants.

These defendants admit that they had opposed the proceedings mentioned as having been in the County Court of Pike County, to subject their lands to such assessment, because these defendants then well knew that the erection of an embankment upon the line of the pretended levee would not reclaim their said lands, because such embankment would only cause the back water and the rain fall of water to stand upon these defendants' land until the crops on the same would be ruined.

These defendants admit that a proceeding was held in the County Court of Pike County and that said County Court rendered a judgment against part of said lands for unpaid assessments and that an appeal was taken to the Circuit Court of Pike County and that an appeal was prosecuted in the Supreme Court of the State of Illinois and that said cause was argued by eminent counsel in the Supreme Court as well for appellant as for appellee.

106

And that the Supreme Court decided that said assessment was unconstitutional.

These defendants deny and say that said commissioners, on the 13th day of March, 1879, did not have any legal right to take, retain and hold the right of way of said pretended levee and other works and property.

These defendants show to the court that complainants, on page 23, Supplemental Bill, adopted, all and singular, the allegation of said Original Bill and amended bills and as to make the same part of this Supplemental Bill.

These defendants distinctly deny each and every material allegation contained in said Original Bill, and each amendment of said Original Bill.

These defendants submit the question as to the legal effect of said former decrees and orders made herein, to this Honorable Court.

These defendants deny and say that there is no valid assess-
107 ments upon which said Master could report in detail.

These defendants deny and say that the said George W. Jones and John G. Wheelock are not commissioners and were not at the time mentioned in said Supplemental Bill.

These defendants deny and say that the said George W. Jones and John G. Wheelock did not neglect their duties in respect to the collection of said pretended assessments.

These defendants aver that said Jones and Wheelock were not required by law to make collections and that there was no duties enjoined upon them in relation to said pretended assessments.

These defendants deny and say that said George W. Jones and John G. Wheelock never did combine or confederate with the owners of said lands to give the said owners the use and protection of said levee.

These defendants deny and say that the said lands mentioned in "Exhibit A" as belonging to these defendants, are not chargeable in equity or liable for the amounts of said pretended assessments against said tracts of lands, because they say that said complainants never did have an equitable lien upon said lands or any part thereof.

108 These defendants do not admit and do not deny the ownership of said lands as set out in said Supplemental and Original Bill.

These defendants deny and say that the pretended assessment contained in the bound book, marked "Exhibit A," is illegal and void.

These defendants deny and say that such of these defendants as acquired title to any portion of said lands in said "Ehibit X" since the making and levying of said pretended assessment of 1872 and 1875, did not have notice of the existence of any lien on said lands or any judgment of valid assessment on the same.

These defendants aver that said illegal assessments, although spread upon the Records in the office of the County Clerk of said Pike County and the office of the Recorder of said Adams and Calhoun Counties, would not and could not constitute notice of a valid assessment, because the Supreme Court of the State of Illinois had decided that said pretended assessments were a nullity.

of 113
ts rep-
by Orr
ford,
22,
1890

These defendants deny and say that said levee and other works were not constructed solely with the moneys furnished
109 by your orators.

These defendants deny and say that they have not appropriated and used the said levee and other works in the protection of their lands, as mentioned in said Supplemental and Original Bill.

These defendants aver that their respective lands would be better protected without said levee embankment.

These defendants deny and say that they did not participate in causing the said bonds to be issued and sold to orators' testator and did not cause the proceeds thereof to be expended in the construction of said levee by actively soliciting and procuring the passage of said act.

These defendants deny and say that they did not participate in causing the said bonds to be issued or sold to orators and did not cause the said pretended assessments to be made on said lands and did not sign or present any petition, whatever, to said County Court of said Pike County in the year 1872.

These defendants deny and say that they did not participate in causing a petition to be filed in the said County Court, in November, 1874 and did not cause or procure the additional or
110 second pretended assessment of said lands in the year 1875, as mentioned in said Supplemental Bill.

These defendants deny and say that they did not have notice or knowledge of the acts and conduct of any person, as former owner of said lands, as having caused or procured said pretended assessment.

But these defendants state, that at the dates in said Original Bill and amendments to said Original Bill, and date of this Supplemental Bill, they have each of them regarded the County Court of said Pike County and the commissioners as a stupendous and tyrannical machine engaged in depriving these defendants of their legal rights and continue to so regard the same, until the Supreme Court of the State of Illinois declared the acts of said County Court and commissioners, in relation to such assessments, void.

These defendants deny and say that the defendants named on page 32 of said Supplemental Bill, did not well know that the said levee and other works had been constructed with the moneys
111 of your orators, the proceeds of said bonds.

But these defendants aver that, prior to the time, to-wit, the year 1877, mentioned on said 32nd page, the original embankment that had been placed, as mentioned in said Original Bill herein, had washed away. Answer of defendants presented & Crawford filed Oct

These defendants deny and say, that said defendants, mentioned on said page 32 of said Supplemental Bill, did not combine among themselves and did not combine with said George W. Jones, John G. Wheelock and Benjamin F. Westlake for the purpose of defeating the just claims of your Orators.

Said defendants, after the Supreme Court's decision aforesaid, were left as they supposed and then honestly believed, without any authority in law to replace said old levee or embankment of dirt or replace the same by compulsion or enforcement of the pretended assessment.

Said defendants then owning lands in said overflowed district and also having expended a large amount of their individual funds in their effort to replace and rebuilt said embankment, and in order to secure their funds to rebuild and replace said levee, certain of said defendants made and executed a deed of trust on their
112 individual lands with which to raise money.

These defendants aver that they never did attempt to execute another and more extensive scheme for defeating your Orators in recovering moneys and never did attempt to defeat your Orators by any scheme whatever.

These defendants aver that they and each of them have not combined or conspired with any one to defeat Orators from recovering moneys that might be due them.

These defendants aver that complainants did not furnish money with which to construct said pretended levee, mentioned in said Original Bill, but, on the contrary, said complainants bought said bonds after the same had been placed on the market by certain parties and said complainants purchased said bonds at a discount, to-wit. 25 per cent discount.

These defendants deny and say, that these defendants did not purchase lands of the owners who had joined with the defendants in executing said trust deed, with full knowledge and notice of the acts and conduct of said owners, who had joined in said deed of trust and did not purchase with notice of the existence of
113 said pretended assessment and did not have notice that said pretended assessment constituted a lien upon said lands.

er of 113 idants rep- ed by Orr wford. Oct. 20, 1890

These defendants aver that the persons mentioned on page 34 commencing with line 16, inclusive to line 25, on page 35, did not constitute a majority of the owners of the lands therein described, and that said petioners did not own one-third of the lands proposed to be reclaimed.

These defendants deny and say, that on January 26, 1880, there was no continuous levee upon and along the east bank of the Mississippi river, of the length of fifty-two miles.

These defendants deny and say, that such parts of said levee as remained on and along the east bank of said Mississippi river, in the year 1880, were not constructed with the bonds purchased by your Orators.

These defendants deny and say, that said County Court of Pike County did not have jurisdiction under the constitutional laws of the State of Illinois, of the subject matter as alleged in said Supplemental Bill, on page 39.

These defendants deny and say, that the levee and other works that had been constructed, mentioned on page 39 of said Sup-
114 plementai Bll, were not constructed with the funds furnished by your Orators.

These defendants deny and say, that they are not bound by said proceedings and appropriations of said levee and other works to the protection of their said lands from overflow, if such proceedings and appropriations of said levee and other works were had and made.

These defendants aver that the organization of a Sny Island Levee Drainage District in 1879, was the creature of the law and that these defendants would have been unable to prevent such organization of sald district.

These defendants deny and aver that they are not bound by any proceedings and appropriations of the said levee and other works by the Sny Island Levee Drainage District, as mentioned on page 46 in the said Supplemental Bill.

These defendants deny and say, that they did not by the acceptance of deed or deeds of conveyance, expressly recognize the pretended lien of Orators upon said tracts of land, for any amount of money.

These defendants again aver, that Orators did not have a lien
115 upon defendants said lands, or any part thereof.

These defendants deny and say that they did not have knowl-

edge that the said levee and other works were constructed with the funds furnished by your orators, as alleged in said supplemental bill, on page 48, line 16 and 17.

Answer o defendan resented & Crawfo filed Oct.

These defendants deny and say by the payment of assessments made upon their said lands by said Sny Island Levee Drainage District, they did not approve, and did not adopt, and did not ratify the acts of said Sny Island Levee Drainage District in taking and appropriating the said levee or as much of said original embankment as existed at the time of the organization of said Sny Island Levee Drainage District.

These defendants aver that whatever payments of assessments that has been made by these defendants or any of them, were made in order to prevent their said lands from being sold.

These defendants did not contrive to defeat the just lien and and rights of orators, as alleged in said supplemental bill, page 49, line 9, but on the contrary, these defendants aver that orators never did have any lien upon these defendants lands or any
116 part of them.

These defendants deny and say that said lands were not swampy, wet, and subject to frequent overflow by the waters of the Mississippi river, as alleged in said supplemental bill, page 50.

These defendants deny and say that said lands were not of small value but did exceed fifty cents per acre.

These defendants deny and say that said commissioners and said land owners never did promise through and by the County Court in the construction of the said levee and other works, according to a plan and prospectus of the said levee and other works prepared and published by the then owners of said lands and by the said commissioners, to influence persons to purchase said bonds.

These defendants deny and say that said commissioners and said land owners never did represent that said levee and embankment, mentioned in said supplemental bill, would drain said lands and every tract of the same and protect them from overflow and render them healthy and productive and so greatly enhance the said lands in value as to make them desirable security for said
117 assessment.

These defendants knew at the time that said embankment was placed along the east bank of the said Mississippi river in the years 1871 and 1872, that the said embankment being so low and imper-

of 113 ants rep- d by Orr ford, t. 20, 1890

fectly constructed that the same could not and would not and did not prevent the overflow of said Mississippi river and that said embankment in many places were removed by the first rise of the said river.

These defendants deny and say that the said Francis Palms, now deceased, and your orators and other holders, did not rely upon the representations of said land owners, made by said commissioners in their behalf and by their authority and upon a plan and prospectus of the said levee and other works, prepared and made by the said commissioners, for and in behalf of said land owners and to said Palms, now deceased, your orators and other holders were not induced to purchase and pay for said bonds to said commissioners, by means of the aforesaid representations, plan and prospectus.

118 These defendants aver that the said Francis Palms, who was then possessed of large sums of money and endowed with a speculative turn of mind, and was then engaged in divers speculations, ascertained that these certain parties who had taken the contract to build said original embankment were the owners of a large amount of the individual bonds mentioned in said Supplemental and Original Bill, and in pursuance to a desire to speculate, the said Francis Palms sought the advice and took the opinion of an eminent attorney or attorneys as to the legality of said bonds, said opinions holding that said bonds were legal and constitutional.

The said Palms and other holders of said bonds, relying upon said opinion and the further fact that said bonds could be purchased at a discount, to-wit, 25 per cent off the face value, bought said bonds of said contractors.

These defendants deny and say that said commissioners did not sell said bonds to said Palms and other holders of said bonds and that the relation of purchaser and seller never did exist between said commissioners and Palms and said other holders of said bonds.

These defendants deny and say that the said lands, mentioned 119 in said Supplemental Bill, page 50, line 34, never were drained and never were protected from overflow and were never made healthy and possible for cultivation and were not enhanced in value to an average of Twenty-five Dollars per acre and were not enhanced one cent per acre by reason of said low and defective embankment mentioned in said Original Bill herein.

These defendants deny and say that if, after first and original embankment was complete, that if the entire area of acres of said land, included in said Levee District, had been placed on the mar-

ket, giving from one to twenty years to pay for the same at the rate of ten per cent. interest, that the whole of said lands could not be sold for a sum equal to one-half of said pretended indebtedness. Answer o defendan resented & Crawfo filed Oct.

These defendants deny and say that they have not combined or confederated together with said commissioners or with any one else in any manner whatever, but in this behalf interposed their legal defense to the cause of action or pretended cause of action set out in said Original and Supplemental Bill.

These defendants deny and say that they did not cause said
120 commissioners to surrender the possession, care and control of said levee and other works to them.

These defendants aver that said original embankment never could have been kept in repair, because the same was so low and defective that it was not sufficient to retain the overflow water from said Mississippi River.

These defendants aver, that miles of said original embankment were placed upon a quicksand foundation and the embankment itself composed of quicksand.

These defendants hereby distinctly deny each and every material allegation contained in said Original Bill and amendment or amendments thereto, and also deny each and every material allegation in said Supplemental Bill and admitted in and by this answer.

These defendants deny all and all manner of unlawful combination and confederacy, wherewith they are by the said bill charged without this that there is any other matter, cause or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not
121 herein and hereby sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge and belief of these defendants all which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

1. Charles E. Morton,
122 2. Perry Wells,
3. Mahala R. Waggoner,
4. Lucinda Newman,
5. James M. Ruyle,
6. Mile M Blake,
7. John S. Lovett,
8. William Henry,
9. Fred Wiedman,
10. Thomas Rodhouse,
11. Lucinda B. DeCamp,
12. George M. DeCamp,
13. Esther DeCamp,
14. John H. Webster,
15. Charles Daniels,
16. John F. Berry,

er of 113 dants rep- ted by Orr tford. Oct. 20, 1890

17. Smith S. Thomas,
18. Albert J. Thomas,
19. C. C. Thomas,
20. Thomas J. Shultz,
21. Z T. Webster,
22. Arthur Venable,
23. Marjorie Sidwell,
24. Jacob Turnbaugh,
25. Mary R. Collins,
26. John Sidwell,
27. Harriet Manker,
28. John McLain,
29. Clark F. Lovett,
30. Elizabeth Jackson,
31. Chas. Jennings,
32. Joseph M. Allen,
33. Alexander Hemphill,
34. William M. DeCamp,
35. Adelia DeCamp,
36. Tata DeCamp,
37. Aug. L. Galloway,
38. P. F. Barton,
39. James R. Berry,
40. Sophia B. Thomas,
41. W. S. Thomas,
42. Elizabeth Schultz,
43. Irwin D. Webster,
44. W. E. Bybee,
45. Albert Venable,
46. Sarah A. Voshall,
47. Adeline Turnbaugh,
48. T. P. Johnson,
49. Anthony Roy,
50. William Oakley,
51. William McLain,
52. William P. Lovett,
53. Eliza Jackson,
123 54. Samuel Bunn,
55. Harrison Martin,
56. Aaron F. Hemphill,
57. James E. DeCamp,
58. Adeline DeCamp,
59. John Jennings,
60. Chas. W. Fleak,
61. Chas. McCaleb,
62. A. F. Ferguson,
63. John S. Thomas,
64. C. J. A. Thomas,
65. Mary Moore,
66. Elizabeth Griffin,
67. Mary J. Venable,
68. Alice Venable,
69. Ruth A. Bryant, (Voshall)
70. John T. Voshall,
71. Alanson Mosier,
72. Albert Hosford,
73. John Henry,
74. Warren A. Tibbitts,
75. W. Douglas Bratten,
76. Wiley A. Farmer,
77. W. A. Kendall
78. Marcia A. Hunter,
79. Henry D. Praul,
80. Ida M. Praul,
81. John Praul,
82. M. B. Steadman,
83. Mary E. Collins,
84. Mary J. Shelby, (Voshall)
85. John B. Harle,
86. Hepsey J. Horsford,
87. George Henry,
88. Robt. F. Bratten,
89. James Hornback,
90. Edward B. Ferguson,
91. Charlotte Westlake,
92. Clinton M. Dodge,
93. Anna Praul,
94. George T. Praul,
95. Adolphus Praul,
96. Peter R. Steadman,
97. Moses DeCamp,
98. Margaret N. Voshall,
99. Mary Hosford,
100. Mary Crews,
101. Alice Jennings,
102. Edward T. Bridge,
103. Sarah E. Hornback,
104. Samuel Clark,
105. Daniel C. Bates,
106. Rebecca Praul,

107. Emma Praul,
108. Randolph L. Praul,
124 109. Andrew J. Lovell,
110. A. B. Steadman,
111. Mary E. Griffin,
112. Edward Prince,
113. Virginia M. Prince.

Answer of defendants represented by and Crawford filed Oct. 2

ORR & CRAWFORD,
Solicitors for these Defendants.

[Indorsed]: Filed October 20, 1890.

JAMES T. JONES,
Clerk.

125

ANSWER OF JOHN G. WHEELOCK AND 357 OTHER DEFENDANTS.

In the

CIRCUIT COURT OF THE UNITED STATES,

for the

SOUTHERN DISTRICT OF ILLINOIS.

Michael W. O'Brien, Francis F. Palms and Clothilde Palms, Executors, and Albert Blair, Complainants.

vs.

John G. Wheelock and others, Defendants.

IN CHANCERY.

Answer of John G. Wheelock and 357 other defendants represented by Hay, Greene & Humphry.

The separate answer of John G. Wheelock, George W. Jones, John E. Adams, F. B. Alford, Buddle H. Atkinson, Harry B. Atkinson, George M. Atkinson, Clement V. Aylesworth, M. M. Aldrich, Jeremiah G. Adams, Matthew Abraham, G. W. L. Baker, Richard H. Baker, William H. Bridge, Harvey O. Bancroft, John W. Boyd, David Boyd, John H. Brammel, Martha A. Blair, Harrison Brown, Henry Bush, John W. Brammel, Charles H. Brown,
John C. Brown, Boyd Levee and Drainage District, Cornelius
126 Brinkman, George Brinkman, Isaac Barton, William T. Barton, James R. Berry, John F. Berry, Norman Brown, William H. Beacom, Charles E. Brewster, Anna M. West impleaded as Anna M. Brewster, Minerva M. Brewster, Carson W. Brewster,

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d other
dants
esented by
Greene &
phry.

Enoch R. Chatten, Martin A. Caldwell, William N. Caldwell, Francis L. Cupp, William A. Chandler, William E. Churchill, Patrick H. Cashman, William C. Chandler, Landy S. Cory, John Clutch, Warren Clutch, Daniel Caffrey, Mary Crews, Andrew Crews, Benjamin Camp, Orlando Camp, A. G. Coley, Ason G. Chamberlain, James Demoins, Joel L. Daud, George A. Dutcher impleaded as Albert Dutcher, Charles C. Dewell, A. M. Danely, Sarah A. Dutcher, Noble M. Dyke, Charles B. Dustin, Jeremiah Dempsey, Phila Donahoe, Taylor Donahoe, Mollie Donahoe, Edna Donahoe and Annie Donahoe, heirs at law of Philip Donahoe, deceased, Joseph E. Dober, James M. Davis, Mary L. Davis impleaded as Mary L. Thompson, James Emerson, Lucy A. Ellis, O. J. Edmonds, August Fiel, George Ferguson, Jesse Fiel, Louisa Ferguson, George Finley, John L. Freeman, George R. Fisher, Irene M. Fesler, Nelson Frenck, F. M. Flegle, executor of the last will of Jacob Flegle, deceased, Catherine Gunsett, George Gunsett, John T. Gunsett, Maria H. E. Gunsett, John Henry Gunsett, William Groh, Charles B. Gose, Ernst Gilhaus, Mary M. Grammar, August Gilhaus, Christopher D. Greene, Samuel B. Gaines, Lewis Green, Dewitt Greene, Ann Gard, John D. Gorton, William H. Gay, James Gay, James C. Gay, Augustus L. Galloway, Ida E. Grimes, Michael
127 W. Hughes, John O. Hampton, Herman Heidbreder, Samuel E. Hewes, Ozias M. Hatch, Mary M. Hull, Everett S. Hull, George Hack, Nancy Hinds, Daniel Hack, Henry Hoyle, R. T. Hicks, Harry Higbee, William H. Hyde, Virginia Hyde, John B. Hill, Julia M. Higbee, Sue W. Higbee, Gilbert H. Henry, H. M. Henry and Ida Farrington, heirs at law of James M. Henry, deceased, Mary L. Horton, George Henry, Isaac A. Hoskins, George Hoskins, Samuel H. Hogsett, Isabel Hogsett, Daniel D. Hicks, Henry Heidholt, James S. Irwin, Frank H. Jones, Fred Jones, Fred Kaiser, George H. Kennady, William H. Knodel, Nancy E. Kinder, Edward Kendrick, Wiley P. Kennedy, Anna E. Kendrick and Andrew Quick, executors of the will of Samuel G. Kendrick, deceased; George Kile, Jr., G. W. Klitz, C. P. Klitz, Claus A. Luken, Elenor Lewton, Julia Lyon, William H. Lewis, George C. Locke, James Likes, Caroline Long, Mary Landrum, William Livingston, James F. Laurimore, Eliza J. Lewis, Andrew S. Lovell, Emeline Long, Phoebe J. Long, William J. Long, Henry N. Long, George P. Long, John Miller, Henry C. Miller, Folkalena M. Miller, Mary Miller, Andrew Miller, Jr., Frederick Miller, Amalie Miller, Brice McCrory, Bernhard Miller, Susanna McTucker, Jessie McTucker, John B. McTucker, Eilert Miller, H. H. Metz, Greene Moore, Asa C. Matthews, Christopher H. Miller, George McFarland, Mary E. Massie, Melville D. Massie, Logan

Answer of J. G. Wheelock and 357 other defendants represented by Hay, Green & Humphry.

T. Morey, Joseph McFarland, Eliza Morey, Nelson Morey, William Morey, William Monroe, Frederick Meyer, J. M. Murray, Francis Marion, Sarah A. Morrison, Newton J. Miller, Elizabeth J. Miller, Lydia Melthizer, James Musgrove, Clay Nickason, Clara Nickason, Walter Nickason, George W. Nowell, Henry Orr, Emily Odi-
128 orne, Mary Odiorne, Andrew P. O'Connor, Thomas Orr, Ernst Pruesner, Mary Pruesner, Mark Penick, Edward Pendleton, Amanda M. Pennefeather, Elijah Petty, William P. Pryor, Easton C. Peckham, Rachel Peckham, George P. Priestly, Samuel Pfrimmer, Johannes Reich, James Robinson, impleaded as James Robertson; Edward A. Rogers and Thaddeus M. Rogers, heirs at law of Timothy Rogers, deceased, Frederick Reich, Melvina Ross, Charles W. Reed, John R. Reed, James D. Rupert, Mary Ramsey, A. D. R. Reichel, impleaded as A. D. Rachael, William H. Raftery, C. H. Rankin, Frederick Speckhart, John Speckhart, George F. Speckhart, William Speckhart, Adam Speckhart, William Schultz, August Schaffer, Charles W. Seymour, Edward Seymour, Abner Shinn, Joel K. Scarborough, Samuel M. Spencer, Joseph J. Stolte, Anton J. Stolte, William Strickhorst, Frank J. Stolte, Sarah B. Selmes, Henry J. Stolte, Seaman Sprague, James W. Sperry, Sny Island Levee Drainage District, Henry J. Sturtevant, John Snider, Solomon Schewe, Ellis M. Smith, impleaded as Alice M. Smith, Lewis K. Smith, Pulaski Shipman, Michael Strubinger, E. M. Seeley, Catherine Schleiker, Charles R. Shaw, Elvira W. Shaw, Stephen V. Shaw, George W. Schwartz, William D. Shinn, Albion Shinn, Henrietta Smith, Theophilus Snyder, Eliza J. Scott, John S. Scott, Irene Stebbins, Frank Stebbins, Mary E. Sapp, Mary A. Sapp, Emma A. Sapp, William F. Sapp, John E. Sapp, Jr., L. A. Sapp, Charles R. Sapp, Bertie E. Sapp, Christopher C. Sapp, H. T. Shaw, impleaded as Thomas H. Shaw, John Schmidt, impleaded as Albert J. Schmidt, Philo E. Thompson, John Twig, Will-
129 iam Tammin, John B. Timmons, Elisha Timmons, Irwin Timmons, William Tolbert, Franklin Titsworth, Samuel Taylor, George H. Tryon, Edward Tryon, Emeline H. Talbert, Lewis Voige, impleaded as Lewis Vorge, Caroline Williamsmeier, Anna S. Woods, Thomas Worthington, Jr., Frank Westhold, John H. Wheelock, George K. Wheelock, Stanley Wheelock, Julia G. Wheelock, Abner V. Mills, William Wilson, Sarah R. Whittaker, Scott Wike, Joseph T. Whitney, William R. Mills, LaFayette Woodruff, John Ward, Lyman Ward, William D. Williams, William Yokem, James C. Yokem, Solomon Yokem, Henry F. Yokem, Levi M. Davis, The Wabash Railroad Co., Mercena Long, Lemuel Long, George W. Long, John McDonald, Stephen McDonald, Joseph E. Jennings, John W. Jennings, William S. Jennings, A.

of John Wheelock & others are rep- ed by Payne & ry.

M. D. Jones, Thomas J. Selby, Supt. Schools Calhoun County, Illinois, Joseph C. Harrison, Hannibal & Naples Railroad Company, Chicago, Burlington & Quincy Railroad Company, I. B. Brittingham, Daniel S. Bowen, Charles N. Clark, Henry Edwards, Harvell Jordan, David M. Morris, Silas W. Mackey, William McIntosh, Elmer Miller, Charles Robb, Cyrus Stewart, John W. Smith, James W. Anderson, Chicago & Alton Railroad Co., to the Bill of Complaint filed against themselves and others in the above entitled cause.

These respondents saving and reserving unto themselves all benefit and advantage that may and can be taken of the many and manifest errors, misstatements and insufficiencies of said Bill of Complaint for answer to so much thereof as they are ad-
130 vised is necessary and material to be answered unto each for himself or herself, answering, says:

These respondents admit that about the 4th day of May, 1878, Francis Palms, then a citizen of the State of Michigan, and since deceased, exhibited in this court his Bill in Equity against John G. Wheelock, George W. Jones and Benjamin Westlake, the latter of whom has departed this life, and that said bill was so exhibited on behalf of said Francis Palms and all others interested who would come in and contribute to the expense of said suit.

It is also true that said Wheelock, Jones and Westlake entered their appearance in said cause and answered said Bill of Complaint.

It is also true that on the 13th day of March, A. D., 1879, said Francis Palms amended his said Bill of Complaint by leave of court.

These respondents do not admit that the contents and substance of the amended bill of said Francis Palms are truly and correctly set forth in the bill which respondents now answer, but for the statements, prayers and allegations of said amended bill these respondents refer to the said amended bill of said Palms now on record in this court.

These respondents admit herein that on or before April 24, 1871, certain persons were the owners of certain tracts of land situate in the counties of Pike, Adams and Calhoun, in the State of Illinois, aggregating about 110,000 acres of land, and the

131 names of such persons purport to be given in a certain Exhibit "A" mentioned in said amended bill of said Francis Palms, deceased, but these respondents deny that said Exhibit "A" truly set forth the owners of said lands.

It is true that many of said lands were contiguous to each other, but generally speaking they were not so contiguous. They were located in the Mississippi River bottom and many of said tracts, but not all thereof, were low and nearly level, and were traversed by a bayou or slough known as the Sny Carte Slough. It is not true that all of said lands were below high water mark of the Mississippi River and without any protection from overflow therefrom, although most of said lands were so situated, and were more or less unfit for cultivation, and were wet and unhealthy.

It is not true that such lands were not on the average worth more than fifty cents an acre, but on the contrary were worth much more. It is true that a large portion of said lands, but by no means the whole thereof, could not be protected or reclaimed except by drains, ditches and levees, and that such land could not be protected or reclaimed by independent works, but only by joint cooperation of all the parties therein, and that such persons were unable to agree upon a plan or raise the means required to construct adequate works.

These respondents each deny that the persons named in Exhibit A procured the passage by the General Assembly of the State of Illinois, on the 24th of April, 1871, of the Act named 132 in page 10 of the printed Bill of Complaint hereby answered.

These respondents will state hereafter all they know of the passage of said act.

It is also true that the owners of certain portions of said land did, at the August term, A. D. 1871, file a petition in the county court of Pike county, Illinois, but it is not true that said owners are truly or correctly named in said original bill.

These respondents deny that the said original bill of said Francis Palms, or his amended bill truly set forth the petition aforesaid, or the substance thereof, or the parties presenting the same, or the action of the Pike county court taken upon said petition. And as to all said matters respondents require full proof.

It is true, however, that a petition was presented to the coun-

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ty court of Pike county at the time aforesaid, and that Commissioners were appointed by said county court under said petition. That plans, surveys and estimates were presented to said court, and said Commissioners did report to said court that said proposed work could be done at a cost which would not exceed $500,000, and that the aggregate benefits of said proposed levee would exceed the cost thereof.

It is true that the said county court of Pike county aforesaid did, at the December term thereof, in the year 1871, confirm the report of said Commissioners; that a jury was appointed and that some kind of a form of assessing damages and benefits was gone through with. It is also true that afterwards the proceed-
133 ings of said jury were confirmed by said county court, so far as said court had lawful power or authority to confirm the same.

That said court did enter a decree ordering the construction of said levee, and that the cost thereof should be charged upon the lands in said district, payable as follows: One tenth in each of the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890 and 1891, with interest at ten per cent. per annum upon said assessments, to be collected from the owners of said tracts from the 1st day of October, 1872.

These respondents distinctly deny that said county court of Pike county had any lawful authority to entertain said petition or to appoint said Commissioners, or said jury, or to confirm the report of said Commissioners or the findings of said jury, or to enter any order of confirmation or any decree whatever authorizing the construction of said levee, or the making of any assessment on the lands in said district, or directing that any indebtedness incurred, or to be incurred, in the construction thereof, should be payable either as to principal or interest, or that the said assessments, or any parts thereof, should become a lien on any of said lands, or a valid claim against the owners thereof. These respondents aver that all said proceedings in said county court, and all steps and proceedings taken under the authority thereof, were wholly and absolutely void in law. That said county court had no jurisdiction of said petition, and no power to make any of
134 said orders or decrees, and that all proceedings taken to carry out such decrees and orders, were absolutely null and void, and unwarranted and prohibited by the Constitution of Illinois.

These defendants expressly deny that the copies of said orders filed in said counties of Pike, Adams and Calhoun, before Decem-

ber 18th, 1872, became notice to any person whatever of the alleged lien of said assessments upon said lands. Respondents also deny that said Commissioners acquired the legal title to the lands required for the site of said levee, or any part thereof.

It is true that the Commissioners did, under the supposed authority of the act of 1871, issue bonds for the amount of $499,500, purporting to be payable in the sums and at the times, and bearing the rate of interest specified on page 13 of the present printed Bill of Complaint, of which bonds Francis Palms purchased to the amount of $202,500. That in order to perform further work on said levee, said Commissioners afterwards issued like bonds to the amount of $148,500, which were all purchased by said Palms. These respondents do not know upon what facts said Commissioners relied in issuing any of said bonds, or on what facts said Palms, or any other person, relied in the purchase of the same, but believe and allege that said Palms and other purchasers of said bonds, in fact relied upon the supposed validity of said act of 1871, and upon the opinion of legal counsel by him or them employed.

These respondents, on information and belief, deny that said Palms or any of the present complainants purchased any of said bonds from said Commissioners; on the contrary, said Com-
135 missioners delivered said bonds to the persons who contracted to build said levee, in payment for the construction thereof, and the said Palms and others purchased said bonds from said contractors.

Respondents, on information and belief, deny that said Commissioners borrowed any money from said Palms or others, or that any money so borrowed was expended in the construction of said levee; but on the contrary, as respondents are informed and believe, all said bonds were issued and delivered to said contractors, and said Palms and all persons who purchased the same from said contractors, well knowing that said bonds were of doubtful validity, purchased the same at a great reduction from the face value thereof; wherefore respondents deny that said Palms or others purchased said bonds at par.

Referring to allegations found on page 14 and page 50, as well as all other allegations of said bill, wherein it is stated that said levee was completed to a sufficient height and of sufficient strength to furnish a full and complete protection to said lands from the waters of said Mississippi river, and that said levee after such completion did afford such ample protection from overflow to the lands embraced in said district; that the same were rendered

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healthy and profitable for cultivation, and were enhanced in value to an average of twenty-five dollars per acre; for answer to all such allegations respondents say:

First. Said levee was imperfect and insufficient in its original construction, in that it was not of sufficient height to retain the waters of said river in times of high water.

Second. The levee was insufficient in size and strength to
136 resist the action of said river in times of medium flow of water.

Third. Said levee as originally built, was improperly located and constructed, in that it was placed so close to said river or on the bank of sloughs, that much of the embankment had to be procured from the landside. The effect of the removal of the earth from the landside of said levee being to weaken and reduce the same by the undermining action of the water.

In consequence of such faulty construction of said levee, and shortly after the completion thereof, to-wit: in the month of April, 1876, three extensive crevasses occurred therein when the stage of water was at least two and one-half feet below the said high water mark of 1851. Immediately thereafter, and after the decision of the Supreme Court of Illinois in the Webster case herein referred to, the said original Levee Commissioners abandoned all care of said levee, and that no work was ever done upon said levee thereafter by or under the supervision of such original organization; that three extensive crevasses occurred in 1880, when said stage of water was five feet below said high water mark; that seven extensive crevasses occurred in 1881, at all of which breaks the stage of water was far below said high water mark, and all of which crevasses occurred before the organization of the present drainage district, or before any effective work could be accomplished thereunder.

That no break occurred in said levee thereafter until the
137 month of May, 1888, when the water in said river reached the highest stage known since 1851. That in said month of May, 1888, numerous breaks occurred in said levee, notwithstanding the fact that said levee had been strengthened and increased by eight years of constant work, and the expenditure of large sums of money, under the supervision of the present Drainage Commissioners.

Answer of G. Wheelo and 357 oth defendants resented by Hay, Gree Humphry.

That in consequence of said numerous crevasses, and prior to the organization of the present drainage district, said lands were reduced to only a nominal value, and were practically worthless, and the owners of said lands, who, by such original construction, were induced to rely upon the promised protection to be offered by said levee, had placed valuable improvements on said lands, which improvements, together with valuable crops, both growing and matured, were, by said overflow, swept away and destroyed, and their owners reduced to poverty.

That said original levee was so fatally defective and wholly insufficient, that in the work of repairing and rebuilding the same at and around said crevasses, an entirely new levee has been constructed to the extent of nearly five miles, of which about three and one-half miles has been relocated upon new and different right of way purchased by said present commissioners.

That after said breaks of 1888, the Congress of the United States appropriated the sum of $50,000 to aid in rebuilding and strengthening said levee, and said sum was so expended, and
138 all the repairs so made upon said levee, have amounted to the sum of not less than $400,000.

Further answering, respondents say that said original levee was 52 14-100 miles in length, but a portion of the same, to-wit: three miles thereof, was built, maintained and owned by and still is owned by the Wabash, the Chicago Burlington and Quincy, and the Chicago and Alton Railroad companies, and said respondents charge the truth to be that said levee, in its present condition and as now constructed, represents all such expenditures aforesaid, and that in repairing, rebuilding and relocating said levee, said large sums of money were furnished from such various sources herein stated, including the moneys furnished by voluntary contribution, the moneys furnished by the land owners who executed a certain trust deed herein described, the moneys appropriated by the Congress of the United States, and the moneys furnished by the Chicago, Burlington and Quincy Railroad Company, the Wabash Railway Company, the Chicago and Alton Railroad Company, and the vast sums collected and expended under the supervision of the Sny Island Levee Drainage District, defendant herein, organized in 1880, and that said money has been mingled and distributed along the entire length and extent of said works from one end thereof to the other.

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It is true that said Commissioners did collect portions of the assessment for the years 1873 and 1874, but it is not true that said money so collected was used in the construction and completion of said levee, but said money was applied by said Commissioners to the payment of interest accrued on said bonds. It is also true that said Commissioners did afterwards attempt to collect other of
139 said assessments, and that such collection was resisted by some of the owners of said lands, to-wit: by Zephaniah T. Webter and others; that proceedings were commenced in the county court of Pike county, Illinois, by the original Levee Commissioners to enforce the collection of assessments imposed on the lands of said Webster and others, and judgment was given against said lands by said county court. That thereupon said Webster and others, by appeal or writ of error, carried said cause to the Supreme Court of the State of Illinois, at its January term, 1876; that thereupon the said Supreme Court, after said cause had been fully argued, reversed the said judgment of the county court, and held such judgment utterly void.

That said supreme court in rendering its opinion in said cause did not discuss the various questions presented, but held and declared that such questions were fully covered and decided by the same court in the case of Updike v. Wright, 81 Ill., 49, and these defendants each aver that the decision of the supreme court aforesaid, in the case of Webster v. Commissioners, is the same decision referred to by complainants in their bill as having determined that said assessments were not legally collectable under the provisions of said Act of April 24, 1871. Each of these respondents distinctly denies that said decision in the Webster case was limited as in the bill alleged, but they aver that said decision embraced all the principles declared in the Updike case before referred to, and that the court in said Updike decision adopted in the Webster decision, declared and adjudged that the said Act of April 24, 1871,
140 and all steps taken thereunder, as well for the levy as for the collection of assessments and also for the construction of said levee itself, were unconstitutional and utterly void.

Further answering, these respondents show that after all said bonds were issued the holders thereof caused them to be registered under the terms of an act entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same." Approved April 9, 1872, in force July 1, 1872. And by the terms thereof the Commissioners had no further authority to collect any of said assessments (even had such authority existed

before that time) but the duty of collecting the same (if such duty could be said to exist at all) was transferred to those public officers who are by law empowered to collect State taxes.

It is true, as respondents are informed and believe, that the principal of said bonds has never been paid, and no interest has been paid thereon since 1875.

It is true that said amended bill of said Palms did pray for relief, as stated on page 15 of the present printed bill.

It is true that said Commissioners did answer said amended bill so filed by said Palms, said answer being referred to in the present bill. These respondents do not admit that the substance of said answer is correctly stated in the present bill, but being expressly referred to therein respondents also refer to the same for a correct knowledge thereof without setting the same forth in this answer. But these respondents allege that the statements
141 contained in the alleged answer of said Commissioners are true so far as they describe the proceedings taken under said Act of 1871, with reference to the construction of said levee, the issue and delivery of said bonds, the attempt made to collect said assessments, and the litigation which arose thereupon, and the result thereof.

It is further true that this Honorable Court did make substantially the orders set forth in said printed bill, beginning at line 19 on page 18 thereof, and ending on page 22 at line 21. But these respondents refer to the record of said proceedings remaining in this Honorable Court for a full understanding of all said proceedings, and for a more correct statement of said orders.

These respondents respectfully allege that all these orders were interlocutory and formal, and did not in any manner affect the rights of any of these respondents, who were not parties to said proceedings, and were not represented therein.

It is true, as these respondents are informed and believe, that Francis Palms did depart this life as stated in the present bill, and did by his last will and testament appoint said Michael O'Brien, Francis F. Palms, and Clothilde Palms, executors of said will. Respondents do not know whether this court made any order authorizing said executors to continue the prosecution of said original

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suit, as no copy of such order is shown in the present bill, nor is the date thereof given therein.

Further averring on information and belief, these respond-
142 ents say that it is true that the persons named on page 23 of the present bill as having been parties complainant in the original proceedings, have refused to go on with the present proceedings.

These respondents do not know whether the present complainants now own any of the bonds mentioned in the Bill of Complaint, or, if so, when the said bonds bear date, nor when they mature, nor what amount of interest is due thereon. As to all such matters the respondents require full proof.

These respondents deny that on the 13th day of March, 1879, said Commissioners, Wheelock, Jones and Westlake, were in actual possesssion of said levee, right of way and works thereon, or that they accepted or entered upon the performance of any duty sought to be imposed upon them by the orders aforesaid. On the contrary, said Commissioners never accepted such appointment, and have never acted as Commissioners since that time.

Respondents deny the conspiracy and confederacy alleged on page 27 of said bill, in lines 15 to 21, inclusive, but it is true that since the decision aforesaid, by the Supreme Court of the State of Illinois, said original Commissioners have not attempted to collect any of said assessments, for two good and substantial reasons—first, that under said decision they could not lawfully do so, and second, that even had the act of 1871 been constitutional in all its parts, the registration of said bonds as aforesaid would have deprived said Commissioners of the power of making such collection.

Respondents deny that the several tracts and parcels of land
143 upon which the assessment of benefits were made under and by the various alleged orders of the county court of Pike county, Illinois, and on page 27 of said printed bill, alleged to be set forth in bound book Exhibit "A," filed with the original bill, are chargeable in equity with, and liable to, the amounts assessed against said tracts or parcels of land as benefits, with interest thereon, as in said bill alleged; and they also deny that any lien exists in favor of complainants upon said lands for the amount of such assessments, with interest, or for any other sum whatever.

Respondents deny that under the said act of 1871, or under

the orders of the county court of Pike county aforesaid, described in the bound book marked Exhibit "X," and so referred to on page 28 of the present bill, they are liable for the said assessments, or any part thereof either at law or in equity.

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In answer to the last allegation on page 28 of said bill, respondents deny that any of the present defendants who acquired title by conveyance, succession or otherwise, to any of the lands described in said Exhibit "X," obtained the same with actual notice of the aforesaid proceedings in the Pike county court, or that the former proceedings in this court gave to any of such persons constructive or actual notice of said assessments, or of any legal or equitable lien on said lands; and respondents also deny that any notice, actual or constructive, if given, could have affected the rights of respondents in any way.

In answer to that part of said bill, on page 29 thereof, which
144 alleges the appropriation of said levee, and certain acts of participation, by these defendants, and also in answer to the allegation commencing at line 14 on page 48 of said bill, that defendants have approved, ratified and adopted the action of the Sny Island Levee Drainage District in taking, appropriating and using said levee and works, these respondents will now state fully all the facts with regard thereto.

In the beginning of the year 1871, and for years before that time, many persons who owned low lands within the original Sny Levee District, were anxious to adopt some means by which such land could be protected from the overflow of the waters of the Mississippi River, and could be drained and rendered productive and healthy. That such land owners were well aware that such lands could not be improved by the efforts of single individuals, or even by the united efforts of a few persons, or groups of persons, and that no system could be of value or justify any such owner in improving his lands, unless such system gave full assurance that substantially all the owners of lands within said district would be compelled to contribute to the expense of such improvement to the extent of benefits derived therefrom, and above all that such system would give full and unmistakable assurance that a levee, if completed, would be maintained and preserved by the same means and by the collection of the cost of such preservation and maintenance from all land owners to the extent of benefits derived therefrom. All said land owners knew, as these respondents aver, the truth to be, that the construction of a levee would be use-

145 less or worse than useless, unless under a system which gave full assurance that the same could be maintained, repaired and preserved by the same compulsory means as that given for the construction thereof. The waters of the Mississippi are subject to frequent freshets by which such a levee would be wasted and injured, and if anyone should improve his land within said district depending on the protection of a levee which could only be maintained by voluntary action, such person would be reasonably certain of losing his improvements and crops and other property.

While said facts were known to said land owners, a bill was introduced into the Legislature of Illinois for an Act which did finally become the Act before referred to, and which was approved April 24th, 1871.

Said Act purported and promised to provide a uniform system by which all the owners of land in said district could be compelled to contribute to the cost of reclaiming the said lands to the extent of benefits derived therefrom, and also purported and promised to provide and furnish the like means for the repair, maintenance and perpetual preservation of said levee and works.

Relying on such assurances none of said land owners opposed or objected to said legislation, and the defendant, Charles N. Clark, one of the owners of said lands, did participate in the passage of said act, but respondents deny that any of the other of said defendants so participated in any manner whatever, and aver the
146 fact to be that the larger number of said defendants were wholly ignorant of such legislation, or of efforts to procure it.

It is also true that said Clark and certain others of said defendants participated in the deed of trust referred to on pages 32 and 33 of said bill, but in doing so they did not confederate, combine, or conspire with anyone to injure complainants or said Palms in any way.

It is also true that certain others of these defendants did participate in procuring the formation of a new drainage district, embracing a part of the same lands as were embraced in the first district, and did, to that end, petition the said county court for the formation of such new district, and these respondents will hereafter set forth particularly the action which each of them took in any or all of the proceedings mentioned in said bill, and they hereby deny any other or further participation or connection with said proceedings, except as herein set forth.

Answer of G. Wheelock and 357 other defendants represented by Hay, Greer & Humphrey.

Respondents further answering, say, that said Clark did not favor such legislation, nor did said other defendants participate in any of the steps taken in the Pike county court, or elsewhere, under said Act of April 24, 1871, except in consideration of all the powers, privileges and advantages purported to be given by said Act and more especially of those parts which gave assurance that the contemplated levee could be maintained and preserved by common contributions to be collected as in said Act set forth; that said Clark, in procuring said legislation, and said other defendants in participating in any of the steps taken thereunder, accepted
147 said Act as a whole and in reliance on all its provisions, and would not have so participated, accepted or consented to the same without the provisions contained for the preservation and maintenance of the work to be created thereunder.

After the passage of said Act, a number of said land owners did join in filing the original petition in the county court of Pike county, Illinois, and in furthering the enterprise, and still others joined in furthering the steps taken to raise the second installment of money with which to finish said levee. Others of said land owners took no part whatever in any of said proceedings, and still others were always opposed to the same, and so expressed themselves. Many of the land owners contended at all times that their lands, because of the location thereof, would not derive any benefit from said work, and still so allege and contend. It is also true that a number of said land owners also insisted and still insist that said work was and is injurious to their lands, tending to cause the same to be overflowed instead of being reclaimed. But not one of said land owners ever gave any assurance or made any representation whatever as to the validity of said bonds or of the lien claimed to be imposed thereon by the levy of said assessments, or as to the liability of said lands or the owners thereof, for any loan of money whatever.

On the contrary, the parties purchasing said bonds purchased the same without any such assurances, and in reliance on their own judgment or the legal advice obtained by them. And these respondents are informed, and believe, and so allege, that the
148 validity of said proceedings, and of said Act of 1871, and of said assessments, and of said bonds, was always a matter of grave doubt, all of which was well known to the purchasers who then bought said bonds, and they in fact purchased and obtained the same at large discount in open market because of such grave doubt.

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Your respondents further show that after the Supreme Court of Illinois had decided said Act of 1871, and the several steps taken under the same to be unconstitutional as aforesaid, the persons owning lands in said original Sny District found themselves in this position: Although said levee had been accepted as complete by said Commissioners under the contract made by them, it was found to be wholly insufficient to protect said lands, and many of the land owners, after improving their lands, found them annually overflowed and exposed to great danger from like overflow in future. Yet the means on which they relied for the protection of said lands, and the promise of which had induced them to consent to said act, and the steps taken under the same were utterly defeated and destroyed. The levee was not only insufficient in height and strength, but was already greatly worn and impaired, yet no assessment could be collected under the law for the protection and preservation thereof. Finding themselves in this condition, knowing that the Act of 1871 had been held unconstitutional as aforesaid, and not knowing that any of said bondholders had or claimed to have any equitable lien on said lands or said levee; and knowing, furthermore, that the preservation of said levee could not
149 be injurious to any person interested therein, certain of said land owners joined in the execution of said trust deed mentioned in said Bill of Complaint. By the terms of said trust said land owners sought to raise money with which to preserve said levee, but the owners of only about 30,000 acres of land out of 110,000, could be induced to join therein. By means of said trust about $30,000 were in fact raised and expended in repairing, strengthening and enlarging said levee. That said trust deed did provide that the money intended to be raised thereunder should not be appplied to the payment of the bonds aforesaid, or any part thereof. The said deed was a voluntary deed in which those who did not join had no concern, and which was not made for the benefit of any of said bondholders, but for the benefit of those who became parties to the same.

These respondents further say, that in spite of such expenditure, such levee still remained insufficient for its purpose, and said Commissioners having no lawful power to collect said assessments, said levee was in great danger of being destroyed and lost to all concerned. Under such circumstances, a number of said land owners joined with other persons, who desired to reclaim low lands in other parts of the State, in inducing the Legislature of the State of Illinois to submit to a vote of the people of said State a proposed constitutional amendment, intended to obviate the defects in the

Answer of John G. Wheelock and 357 other defendants represented Hay, Greene & Humphry.

Constitution of 1870, by means of which the act of 1871 failed, and to authorize the Legislature to pass such laws as would permit the prosecution of such enterprises successfully. Said Constitutional amendment was accepted by the people, and under the terms 150 thereof a new drainage act, entitled "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," was adopted by said Legislature, which was approved and in force May 29, 1879. Under the provisions of said last mentioned act, a number of said land owners afterwards formed a new drainage district, known as the Sny Island Levee Drainage District, which district is now in existence, as stated in the present Bill of Complaint, on page 38 thereof.

Your respondents show that the present drainage district embraces about 90,000 acres of the land embraced in the original district, a part of the lands forming the original district being left out of the present district. One of the purposes for which the present drainage district was organized, was the maintenance, preservation and enlargement of the old levee aforesaid, and there has been raised by the present drainage district, and has been expended in such preservation, enlargement and maintenance, the sum of about $400,000. Yet in spite of the expenditure of the moneys raised under the trust deed aforesaid, and under the act last aforesaid, the cost of keeping and protecting said levee is so great that said levee is still wholly insufficient for its purpose, not more than six or seven miles thereof, out of upwards of fifty miles, being of sufficient height and strength, and this although the Commissioners of the present district have done all they could, under the law, to raise sufficient means to render said levee sufficient, 151 said Commissioners having, in 1889, levied a special assessment of $100,000 in addition to the annual assessment of about $20,000.

Respondents further show that the land owners who joined in the steps taken to procure the passage of the present drainage law, and in the formation of the present drainage district, did so without any knowledge that the complainants even claimed any lien on any of said lands, and under the belief that whatever might be the equitable right of any person or persons, the preservation of the levee aforesaid could not be injurious to any person interested therein. And they now and here aver that the appropriation of what remained of the old levee by the present drainage district,

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did not deprive said complainants of any right or advantage whatever, and does not injure them in any degree, and such appropriation was only made after the abandonment of said levee by the original organization as hereinbefore stated.

For further answer in this behalf respondents say: that from the 7th day of July, 1880, when the last order was made in the suit commenced by said Francis Palms in this court, until the filing of the present Bill of Complaint, a period of nearly nine years, said Palms did not, nor did anyone in his behalf or on behalf of any of said bondholders, take any steps whatever in said cause, but in law and in fact abandoned the same. That the said laches of said Palms and his representatives in said cause, really worked a discontinuance of said original cause, and gave assurance to all parties who originally knew of the pendency thereof, that the same
152 was abandoned. That such course so far from giving notice to any of said land owners of the pretended claims of the complainants herein, in fact amounted to an abandonment of all the claims set up in the original bill. These respondents insist that claimants can derive no benefit or advantage under said original bill or any step taken or order entered therein, and that the same did not constitute notice to any of these respondents of any fact or claim whatever.

Respondents deny that they or any of them purchased lands in said district of or through other land owners who had joined with M. M. Aldrich and others in signing and presenting to said county the petition as alleged, with full notice, or with any notice of the existence of such assessments, or that they constituted a lien on said lands, and defendants deny that such assessments did or do constitute such lien. The allegation hereby denied is the allegation beginning at line 35 on page 30, and extending to line 6 on page 31 of said bill.

Respondents further deny that they or any of them purchased lands in said district through other land owners who had joined with others of defendants in signing and presenting to said county court the petition mentioned on page 31 of said bill, with full knowledge of the acts and conduct of said last mentioned land owners, and with full or any notice of the existence of said assessments, or that the same were unpaid, or constituted a lien on said lands, and respondents say that such assessments did not and
153 do not constitute such lien. The allegation hereby denied is

Answer of J G. Wheelo and 357 oth defendants resented by Hay, Green Humphry.

the one beginning at page 31 line 30, and extending to page 32 line 2 of said bill.

Respondents further deny that they or any of them purchased lands in said district from or through other land owners who had joined with others of defendants in executing a deed of trust, mentioned on pages 32 and 33 of said bill, with full or any knowledge or notice of the acts and conduct of said last mentioned land owners, and with full or any notice of the existence of said assessments, or that the same were unpaid, or constituted a lien on said lands, and respondents deny that such assessments did or do constitute such lien. The allegation herein denied is the one contained in said bill between lines 8 and 5 on page 34 thereof.

Respondents further deny that they or any of them purchased lands in said district from or through other land owners who had joined with others of defendants in presenting the petition described on pages 34 to 38, inclusive, of said bill, or in organizing said Sny Island Levee Drainage District, or in any subsequent actions thereunder, with full or any knowledge or notice of the acts or conduct of said last mentioned land owners, or with full or any notice of the existence of said assessments, or that the same were unpaid, or constituted a lien upon said lands, and they further deny that said assessments did, or do in fact, constitute such lien. The allegation of said bill hereby denied is the one contained between line 32 on page 39, and line 4 on page 40 thereof.

In answer to the allegation contained in said bill on pages 154 46 and 47, that the parties therein named, to-wit: Eliza D. Anderson and others, are heirs at law of and take title to certain lands from ancestors who participated in proceedings by which said bonds were caused to be issued and said assessments made, and said levee or other works appropriated, or used for the protection of said lands, respondents say that they are not advised as to whether said defendants took such lands from ancestors as alleged, or if so, whether such ancestors took any part whatever in any of said proceedings, or if said ancestors did participate in such proceedings, what their acts of participation were, and as to all such averments respondents call for full proof.

Respondents deny that defendants, Charles M. Alger and others, named on pages 47 and 48 of said bill, have acquired title to any lands as alleged by the acceptance of deeds of conveyance expressly recognizing the lien of complainants upon said lands for

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moneys advanced by them for the construction of said levee and works, and respondents further deny that complainants at any time did advance any moneys for such levee and work.

Further answering, respondents say that a large portion of the lands in said bill described, and on which complainants claim to have a lien, were heretofore sold for State and county taxes, and that said lands were purchased by the Sny Island Levee Drainage District, and deeds therefor have been issued to such purchaser, and respondents aver that said lands are now held by said pur-
155 chaser under said tax deeds by a title paramount and superior to the alleged lien of complainants, and paramount and superior to the claim or right of any other person or persons.

The lands so held and owned by said Sny Island Levee Drainage District under said tax deeds are described as follows, to-wit:

DESCRIPTION.	Section.	Township.	Range.	Acres.
Ne cor ne	18	4	7	28
Middle part ne	18	4	7	20
S½ ne	18	4	7	30 88/100
Middle part ne	18	4	7	19
Sw nw	26	4	7	44
Se cor se nw	26	4	7	2
E side s side ne	27	4	7	6½
Se ne	36	4	7	40
E side nw se	32	4	7	30
Se sw	32	4	7	40
Sw cor ne	21	4	7	5
Ne cor n½ e½ se	35	4	7	1 88/100
Mid div n½ se	33	4	7	16
Pt lot 6, e side sw	7	4	7	10
S pt nw ne	7	4	7	32
N½ sw	20	5	6	80
E¼ sw	28	5	6	80
W end nw sw	30	5	6	40
E pt nw	31	5	6	36
Nw	34	5	6	160
Se	34	5	6	160
S½ se	18	5	6	80
Pt ne ne	19	5	6	30
W pt s½ sw	8	5	6	47
N½ nw sw	6	5	6	26½
Ne sw	30	5	6	40

DESCRIPTION.	Section.	Township.	Range.	Acres.
Ne	32	5	6	160
Pt se	1	5	7	100
Se	10	5	7	160
Se se	15	5	7	24
156 Pt s½ se	24	5	7	76
Ne	25	5	7	155
Se ne	15	5	7	40
Nw ne	15	5	7	40
E pt n½ n½ nw	15	5	7	27
Ne cor nw	15	5	7	15
Ne se	16	5	7	40
Sw pt nw	23	5	7	40
Sw cor s½ se	24	5	7	4¼
Ne pt ne sw	26	5	7	2
Se ne	1	5	7	38
N cor sw	15	5	7	22
Ne ne	15	5	7	22
N side se	4	5	7	40
S½ sw	10	5	7	80
Ne	9	5	7	146
Ne	12	5	7	160
Sw ne	15	5	7	40
N½ s½ nw	15	5	7	40
Pt sw	24	5	7	140
W½ and se sw	24	5	7	110
S½ ne	5	5	7	80
Ne	11	5	7	160
Se	12	5	7	160
Nw	13	5	7	160
W side ne	13	5	7	10
W side ne	13	5	7	10
Sw	13	5	7	160
Se	25	5	7	160
N½ ne	9	5	7	40
S½ ne sw	24	5	7	20
Sw pt ne	20	6	5	1½
Sw se pt se	35	6	5	6½
Pt ne	30	6	5	80
Nw	33	6	5	157
W½ sw	29	6	5	80
N½ ne	31	6	5	80
E½ se	30	6	5	80
Se	3	6	6	160

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	W ½ se	5	6	6	70
	Ne se	5	6	6	40
	Ne	8	6	6	160
	157 Sw pt nw	12	6	6	83
	Se	13	6	6	160
	Ne	24	6	6	160
	Nw	24	6	6	160
	E pt e ½ fr'l nw	35	6	6	58
	Sw cor se fr'l nw	35	6	6	2
	Ne	3	6	6	160
	Nw	9	6	6	160
	Pt nw s ½ ne	11	6	6	62
	Sw	2	6	6	160
	Se se	5	6	6	40
	W ½ ne	9	6	6	80
	Nw	23	6	6	160
	N pt s ½ sw	8	6	6	33
	Se	10	6	6	160
	Ne	10	6	6	160
	N side sw	10	6	6	120
	Sw pt ne se	17	7	4	11
	W pt sw	7	7	4	82
	Sw pt nw	7	7	4	39
	Lot 10 ne	28	7	4	33
	Sw pt n pt w ½ nw	28	7	4	42
	Lot 6 ne	28	7	4	16
	Sw pt se	29	7	4	60
	Und ¼ nw	33	7	4	40
	S end sw se	21	7	4	6
	Ne ne	33	7	4	40
	Sw pt n ½ nw	18	7	4	85
	W pt e ½ ne nw	19	7	4	20
	Pt sw Sny sw	31	7	4	40
	E ½ se	28	7	4	80
	N pt nw	13	7	5	82
	Se ne	3	7	5	40
	S of R R pt ne	14	7	5	120
	N of R R pt ne	14	7	5	40
	W side lot 7	16	7	5	14
	E ½ se nw	22	7	5	20
	N of Sny sw	26	7	5	65 $\frac{88}{100}$
	Ne pt fr'l sw	35	7	5	18
	Lots 1, 2, 3, 4, 5, 6, 7 and 8 in fr'l se	35	7	5	82

DESCRIPTION.	Section.	Township.	Range.	Acres.
E½ ne	36	7	5	60
Se	11	7	5	160
158 S pt n pt nw	13	7	5	22
S½ s½ nw	14	7	5	20
S side sw	3	7	5	50
S of Sny sw	26	7	5	71½
Ne pt fr'l ne	34	7	5	64
W pt s½ ne	35	7	5	49
S of R R ne	14	7	5	120
Ne nw	22	7	5	40
Nw	25	7	5	160
Fr'l nw	27	7	5	69
Nw	35	7	5	160
Ne fr'l nw	35	7	5	140
Se	36	7	5	158

Answer of J G Wheelo and 357 oth defendants represented Hay, Green Humphry.

Respondents show that relying on all the advantages of said Act of 1871, and all the powers therein granted, and in consideration thereof, the following named respondents did sign and present the original petition to the county court of Pike county, Illinois. That said petition was so signed and presented on the 21st day of August, 1871, and not in the year 1872, as averred on page 30 of said bill. Respondents so participating in said proceedings were:

James Davis, William Chandler, John W. Brammel, Henry Orr, M. D. Massie, Elijah Petty, Jeremiah G. Adams, John Ward, Henry Edwards, John G. Wheelock, John H. Brammel, A. G. Chamberlain, George McFarland, C. B. Dustin, Francis Marion, John D. Gorton, S. M. Spencer, C. B. Gose, J. W. Sperry, Harrison Brown, M. M. Aldrich, Samuel Taylor, William Yokem.

That relying as aforesaid, the following named respondents did
159 join in the second petition under the Act of 1871, to the county court of Pike county aforesaid, namely:

C. N. Clark, Eiljah Petty, J. S. Irwin, Michael W. Hughes, S. M. Spencer, M. M. Aldrich, Norman Brown, F. Kaiser, William McIntosh, J. K. Scarborough, Jeremiah G. Adams, A. C. Matthews, M. D. Massie, Chas. B. Dustin.

But after the signing and presentation of said second petition

wer of John Wheelock 357 other defants sented by Greene & pbury.

the name of the said A. C. Matthews, by order of said court, was erased and removed from said petition.

That the following named respondents did join in the trust deed mentioned in said bill of complaint:

J. R. Scarborough, Eilert Miller, Elijah Petty, William H. Livingston, J. G. Adams, Melville D. Massie, J. K. Scarborough, A. C. Matthews, Dewitt Greene, Mary M. Grammar, A. G. Chamberlain, Geo. W. Jones, Abner V. Wills, John W. Smith, John W. Brammel, William H. Gay, James Gay, Mary E. Massie, John H. Brammel, Edward Seymour, Scott Wike, Michael Strubinger, Susannah Rowand, Julia M. Higbee, William R. Wills, William H. Raftery, James S. Irwin, William Shinn, Newton J. Miller, 160 Charles B. Dustin, Theopilus Snyder, Mary A. Robbins, George Ferguson, Lucie Clark, Joseph J. Stolte, John Reed, Albion Shinn, Irene M. Fesler, Samuel P. Pfrimmer, Isaac N. Hoskins, Samuel M. Spencer, B. M. McCrory, Charles N. Clark, R. H. Baker, John H. Wheelock.

That the following named respondents did join in the formation of the present drainage district by signing the petition therefor, namely:

S. M. Spencer, John Adams, J. K. Scarborough, C. W. Seymour, William Groh, William Speckhart, Fred Speckhart, A. C. Matthews, O. M. Hatch, W. R. Mills, John Reich, Melvin Ross, J. W. Brammel, Virginia Hyde, I. B. Brittingham, Marcus Hardy, John Reed, John H. Heidholt, R. H. Baker, E. Seymour, M. W. Hughes, John Speckhart, Adam Speckhart, F. Kaiser, Scott Wike, Charles N. Clark, J. S. Irwin, A. V. Wills, H. B. Atkinson, John H. Brammel, William H. Hyde, Joseph Stolte, Landy S. Corey, 161 P. H. Cashman, Henry J. Sturtevant, Bernhard Miller, Emily J. Odiorne, Samuel Pfrimmer, M. Strubinger, James Likes, Elijah Petty, W. H. Raftery, Newton J. Miller, Elvira W. Shaw, Mary T. Ramsey, Matthew Abraham, W. H. Livingston, Mary E. Massie, Andrew J. Crews, Logan Morey, Sarah A. Dutcher, Theophilus Snyder, Emeline H. Talbert, Albion Shinn, M. L. Horton, James Gay, I. A. Hoskin, Solomon Yokem, Ann Gard, D. M. Morris, J. W. Sperry, Eleanor Lewton, William Shinn, A. G. Chamberlain, D. W. Greene, Mary M. Grammer, Isaac Barton, William Barton, J. D. Rupert, C. B. Dustin, J. G. Adams, C. C. Sapp, M. D. Massie, J. B. Hill, Mary Crews, George A. Dutcher, Henry Stolte, Irene M. Fesler, William D. Shinn, William H. Gay,

John Ward, Orlando Camp, J. M. Davis, Enoch R. Chatten, A. D. Reichel.

Answer of J. G. Wheelock and 357 oth defendants represented Hay, Green Humphry.

That the following named respondents took no part whatever in procuring the legislation aforesaid, or the formation of either of said drainage districts, or in any of the proceedings in the county court of Pike county, or in procuring the adoption of 162 said assessments, or in the issue or sale of said bonds, but each of said respondents did acquire title to some of the lands in said original levee district by purchase or by inheritance, but the persons from whom said lands were so derived and who owned the same at the time when the proceedings aforesaid occurred, were not parties thereto, nor did they participate therein, and said respondents, so named, when they acquired their titles, respectively, had no notice whatever of any lien, equitable or otherwise, on said lands, or of the claim of complainants to such lien:

John E. Adams, Clement V. Aylesworth, William H. Bridge, John W. Boyd, Martha A. Blair, Charles H. Brown, Cornelius Brinkman, James R. Berry, Martha A. Caldwell, Frances L. Cupp, John Clutch, A. G. Coley, A. M. Danely, Jeremiah Dempsey, Lucy A. Ellis, August Fiel, George R. Fisher, George Gunsett, Fred B. Alford, G. W. L. Baker, Harvey O. Bancroft, David Boyd, Henry Bush, John C. Brown, George Brinkman, John F. Berry, William Caldwell, William H. Churchill, Warren Clutch, Joel L. Doud, Noble Dyke, Joseph E. Dober, James Emerson, Jesse Fiel, Catherine Gunsett John T. Gunsett, Maria H. E. Gunsett, Ernst 163 Gilhaus, C. D. Greene, August L. Gallaway, Herman Heidbreder, Fred Hack, R. T. Hicks, Samuel Hogsett, Daniel D. Hicks, Dollie Kuchman, Edward Kendrick, C. P. Klitz, William H. Lewis, Caroline Long, James F. Laurimore, Eliza J. Lewis, Phoebe J. Long, Henry A. Long, John Miller, Folkalena M. Miller, Andrew Miller, Jr., Amalie Miller, Greene Moor, William Monroe, J. M. Murray, Walter Nickason, Clara Nickason, A. P. O'Connor, Thomas Orr, Mary Preusner, John Henry Gunsett, August Gilhaus, Lewis Greene, John O. Hampton, George Hack, Nancy Hinds, George Henry, Isabel Hogsett, William H. Knodel, Nancy E. Kinder, G. W. Klitz, Claus A. Lewton, B. C. Lindsay, Mary Landrum, A. J. Lovell, Emeline Long, William J. Long, George P. Long, Henry C. Miller, Mary Miller, Frederick Miller, H. H. Metz, Christopher H. Miller, Frederick Meyer, Lydia Melhizer, Clay Nickason, George W. Nowell, Mary Odiorne, Ernst Preusner, Edwin Pendleton, Amanda M. Pennefeather, Easton C. 164 Peckham, C. H. Rankin, William Strickhorst, Ellis M. Smith,

er of John Wheelock 37 other dants rep- ed by Greene & bury.

E. M. Seeley, Stephen Shaw, Irene Stebbins, H. Shaw, Franklin Titsworth, Lewis Voige, Thomas Worthington, Jr., Joseph T. Whitney, Wm. D. William, Mercena Long, George W. Long, Stephen McDonald, Wm. S. Jennings, A. M. D. Jones, Joseph C. Harrison, Quincy, Alton and St. Louis Railroad Company, Wabash, St. Louis and Pacific Railway Company, Daniel S. Bowen, David M. Morris, William McIntosh, Cyrus Stewart, Elmer Miller, William P. Pryor, Rachel Peckham, William Schultz, Seaman Sprague, Louis K. Smith, Charles R. Shaw, Henrietta Smith, Frank Stebbins, Philo E. Thompson, Mary L. Davis, Anna S. Woods, Sarah R. Whittaker, Lafayette Woodruff, Levi M. Davis, Lemuel Long, John McDonald, J. E. Jennings, John W. Jennings, Thos. J. Selby, Chicago, Burlington and Quincy Railroad Company, Chicago and Alton Railroad Company, I. B. Brittingham, Harvel Jordan, Silas W. Mackey, Charles Robb, James W. Anderson,.

That the following respondents never had anything to do with
165 any of the proceedings in the bill alleged, and never participated therein, or even consented thereto, and never joined in any of the proceedings alleged in the present bill to have been taken by any of the said land owners:

W. S. Jennings, J. W. Jennings, John McDonald, Thos. J. Selby, Supt. of Schools of Calhoun county, Ill.; Levi M. Davis, Joseph C. Harrison, Eliza J. Scott, Philo Donahoe, Mollie Donahoe, Annie Donahoe, H. M. Henry, Harry Higbee, Julia M. Higbee, Susannah McTucker, Jessie McTucker, James Musgrove, Edward A. Rogers, Mary T. Ramsey, Wm. F. Sapp, Emma A. Sapp, L. A. Sapp, Bertie E. Sapp, George H. Tryon, James C. Yokem, John E. Adams, J. E. Jennings, Lemuel Long, Steven McDonald, H. C. Long, George W. Long, John S. Scott, Taylor Donahoe, Edna Donahoe, Gilbert H. Henry, Ida Farrington, Sue W. Higbee, Anna E. Kendrick and Andrew Irick, executors; John B. McTucker, George P. Priestly, Thaddeus M. Rogers, Mary E. Sapp, Mary A. Sapp, John E. Sapp, Jr., Charles R. Sapp, Christopher C. Sapp, Edward Tryon, Hannibal & Naples R. R. Co., Fred B.
Alferd, Clement V. Aylesworth, William H. Bridge, John W.
166 Boyd, Marth A. Blair, Charles H. Brown, Cornelius Brinkman, James R. Berry, Martha A. Caldwell, William Caldwell, John Clutch, A. G. Coley, A. M. Daneley, Jeremiah Dempsey, Lucy A. Ellis, August Fiel, George R. Fisher, George Gunsett, Maria H. E. Gunsett, Ernst Gilhaus, C. D. Green, Augustus L. Gallaway, Herman Heidbreder, Fred Hack, R. T. Hicks, Samuel Hogsett, Daniel D. Hicks, Dallie Kuchman, Edward Kendrick, C. P. Klitz, William H. Lewis, G. W. L. Baker, Harvey O. Bancroft,

David Boyd, Henry Bush, John C. Brown, George Brinkman, John F. Berry, Francis L. Cupp, William H. Churchill, Warren Clutch, Joel L. Daud, Noble Dyke, Joseph E. Dober, James Emerson, Jesse Fiel, Catherine Gunsett, John T. Gunsett, John Henry Gunsett, August Gilhaus, Lewis Green, John O. Hampton, George Hack, Nancy Hinds, George Henry, Isabel Hogsett, William H. Knodel, Nancy E. Kinder, G. W. Klitz, Claus A. Lewton,
167 B. C. Lindsay, Caroline Long, James F. Laurimore, Eliza J. Lewis, Emeline Long, Henry A. Long, John Miller, Mary Miller, Andrew Miller, Jr., Amalie Miller, Greene Moore, William Monroe, J. M. Murray, Walter Nickason, Clara Nickason, A. P. O'Connor, Thomas Orr, Mary Preusner, Amanda M. Pennefeather, Easton C. Peckham, C. H. Rankin, William Strickhorst, Ellis M. Smith, E. M. Seeley, Stephen Shaw, Irene Stebbins, H. Shaw, Franklin Titsworth, Lewis Voige, Thomas Worthington, Jr., Joseph T. Whitney, Mary Landrum, A. J. Lovell, Phoebe J. Long, William J. Long, George P. Long, Henry C. Miller, Folkalena M. Miller, Frederick Miller, H. H. Metz, Christopher H. Miller, Fredrich Meyer, Lydia Melhizer, Clay Nickason, George W. Nowell, Mary Odiorne, Ernst Preusner, Edwin Pendleton, William P. Pryor, Rachel Peckham, William Schultz, Seaman Sprague, Louis K. Smith, Charles R. Shaw, Henrietta Smith, Frank Stebbins, Philo E. Thompson, Mary L. Davis, Anna S. Wood, Sarah R. Whittaker, Lafayette Woodruff, William D. Williams, Mercena
168 Long, Joseph C. Harrison, Chicago, Burlington & Quincy Railroad Company, Quincy, Alton & St. Louis Railroad Company, Chicago & Alton Railroad Company, Wabash, St. Louis & Pacific Railway Company, I. B. Brittingham, Harvel Jordan, Silas W. Mackey, Charles Robb, James W. Anderson, Levi M. Davis, George W. Long, Daniel S. Bower, Daniel M. Morris, William McIntosh, Cyrus Stewart, Elmer Miller.

These respondents have now fully set forth all that was ever done by them or any of them, with reference to said levee and said drainage districts, and said bonds, or in connection with any of the proceedings referred to in the Bill of Complaint.

These respondents utterly deny that they have appropriated the remains of the old levee in any such a way as to deprive the complainants of any right, interest or benefit which they might otherwise enjoy, if any such right or interest has any existence.

Respondents deny all the allegations of said bill as to the

wer of John Wheelock 337 other plaints mented by Grec. 2 & pbry.

benefits derived by them from said levee, and they deny that any of said lands have thereby been enhanced in value as alleged in the bill. They utterly deny all the allegations of said bill which charge them with conspiracy, or confederating to deprive or injure complainants or any of them in any way.

Further answering, respondents say that the object, pur-
169 port and prayer of the said bill is the collection of a tax, and that such purpose is not a subject of equity jurisdiction, and that the remedy of said complainants, if they have any, is at law and not in equity.

And each and every allegation of said bill of complaint not heretofore admitted or denied is now specifically denied.

And now having fully answered, these respondents and each of them pray to be hence dismissed with their costs, according to the practice of this honorable court.

HAY, GREENE & HUMPHREY,
Solicitors for said Defendants.

Springfield, Ill., Oct. 22, 1890.

174 Afterwards, to-wit, on the 4th day of November in the June Term of said Court in the year last aforesaid the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael W. O'Brien et al.,
Complainants,
vs. } In Equity.
John G. Wheelock et al.,
Defendants.

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175 On reading and filing the stipulation signed by Messrs. John M. and John Mayo Palmer, solicitors for complainants, and Messrs. Hay, Greene and Humphrey, solicitors for a large number of the defendants, and Messrs. Orr and Crawford, solicitors for a large number of other defendants (the above named counsel representing all the defendants who have appeared in the cause) and on motion of John M. and John Mayo Palmer, solicitors for the complainants, it is ordered that the following title, to-wit:

In the Circuit Court of the United States.
For the Southern District of Illinois.

Michael W. O'Brien et al., Complainants, vs. John G. Wheelock et al., Defendants. } In Equity. Sny Levee District Bond Case.

Order prescribing title of cause.

shall be the title of this cause, and sufficient in all affidavits, depositions and orders and stipulations in all respects the same as if the names of all the complainants and defendants were therein written out in full.

And afterwards, to-wit, on the 7th day of January in the year of our Lord One Thousand Eight Hundred and ninety-one came Albert L. Allen and certain other defendants and filed their separate answers to the bill of complaint herein which answers are as follows, to-wit:

176

In the Circuit Court of the United States.
For the Southern District of Illinois.

Michael W. O'Brien, Francis F. Palms & Clothilde Palms, Executors, & Albert Blair,

Complainants, In Equity.

vs.

John G. Wheelock et als.,

Defendants.

Answer of non-resident defendants represented by Hay, Green & Humphry.

The separate answers of Albert L. Allen, Charles M. Alger, George Anderson, John Blaul, John Burkholder, Thomas H. Branham, Mrs. Mary E. Baker, Thomas Brittingham, I. Byron, John Cole, A. E. Clark, Charles P. Clifford, Charles N. Clark, Frank P. Canterbury, Thomas Davis, David Dubach, Fred L. Dubach, William Durwin; Wm. A. Davis, Frank Davis, Thomas Davis, Edward Davis, Ella Davis, Andrew Davis, Mrs. Fanny Hilton, heirs of J. T. Davis, deceased; Jacob H. Dickason, Harriet A. Dickason, Henry F. Davis, Sarah E. Delano, Alfred M. Delano, John H. Douglas, Simon Daub, Anna J. Dodge, Eliza Davis, Wilson B. Elliott, William H. Fisher, Wm. Lausser, holds trust deed on Fishers land; John H. Franklin, Wm. L. Foot, Jacob Fisher, Letitia Green, Wm. A. Gordon, Dennis Green, Wm.

177 Glascock, Edward A. Glenn, Catherine S. Harvey (mortgagee), Tyre A. Hayden, John A. Hampton, Albert G. Hamlin, Daniel L. Hafner, Charles Hanson, John T. K. Hayward, Adam C. Hilton, John R. Helms, Mrs. Etta Hardin, Wm. C. Hardin, Wm. H. Hatch, Harvel Jordan, George M. James, Alexander C. James and Jesse H. Rector, administrators of J. D. James, deceased; John Jordan, Isaac Lindley, D. M. Morris, Henry Merill,

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Wm. H. Miller, Henry W. Morris, Wm. A. Munger, Lyman P. Munger, Catherine T. Meredith, Wm. M. Merriweather, F. C. McCann and A. R. McCann, administrators of A. R. McCann, deceased; Mary F. McTucker, James McTucker, John J. McCune, Joseph M. McIntosh, James A. Nelson, Andrew J. Newland, N. W. Northcutt, Fred Naxera, Wm. H. Odiorne, John Penn, Albert W. Pettibone, Elmer H. Packard, W. B. Pettibone, Mrs. Mary A. Post, Hannibal W. Pitzer, John B. Price, W. W. Pierce, John O. Roberts, Joseph Rome, Charles T. Smith, P. O. Sharpless, Wm. Shively, J. W. Stark, Walter Scroggan, John B. Shepherd, Edward C. Schmidt, Sarah B. Selmes, Richard Schmidt, Mrs. Mary L. Smith, Fanny C. Stillwell, Richard H. Stillwell, Harold Stillwell, Earl Stillwell, Joseph M. Thurman, Mary Stillwell, John L. Van Every, Lucy P. Wiggins, Joseph T. Zook and Wm. McIntosh, defendants to the bill of complaint in said cause.

These respondents because of the number of defendants in said cause and the length of the answers required therein, in order to avoid unnecessary encumbering the record thereof, by 178 leave of the Court first had and obtained, hereby separately adopt the answer filed by John G. Wheelock and others to said bill of complaint. Except that each of these respondents will further set forth herein the particulars of his, her or its participation in all or any of the acts, measures or proceedings alleged in said bill of complaint.

These respondents each for himself allege that all the statements, averments and denials in said answer of John G. Wheelock and others contained, are true, and each and all hereby adopt and affirm as part of the answer of these respondents.

These respondents hereby separately state how far he, she or it participated or did not participate in any of the steps or proceedings alleged in said bill of complaint.

The following named respondents did sign and present the original petition as set forth on page 34 of this answer, to-wit: Daniel L. Hafner, John Burkholder, Dennis Green, Wm. A. Gordon, Henry W. Morris (now deceased).

The following respondents joined in the second petition under the act of 1871 as set forth on page 35 of original answer herein: Albert L. Allen, Henry W. Morris (now deceased), Thomas H. Branham, Daniel L. Hafner, Dennis Green.

Answer o non-resid defendant represent Hay, Gre Humphry

The following named respondents joined in the Trust deed made, named in bill of complaint and referred to on page 35 of original answer herein: Hannibal W. Pitzer, Anna J. Dodge (impleaded as McTucker), James McTucker, Wm. H. Odiorne, Walter Scroggan, Willson B. Elliot, Catherine Y. Meredith, Dennis Green, Letitia Green, Henry W. Morris (deceased), Daniel L. Hafner, Wm. A. Munger, James A. Nelson, Albert L. Allen, 179 John Burkholder, William H. Miller, Albert G. Hamlin, J. H. Dickason, Harriet A. Dickason, Thomas Branham.

The following respondents joined in the formation of the present drainage district by signing the petition therefor as mentioned on page 36 of original answer: Wm. A. Davis, Albert W. Pettibone, W. B. Pettibone, Albert L. Allen, Thomas H. Branham, J. H. Dickason, Catherine Y. Meredith, John B. Shepherd, John B. Price, David Dubach, Fredrick L. Dubach, John Jordan, James A. Nelson, Wm. A. Munger, L. T. Brittingham, Lyman P. Munger, W. B. Elliot, Dennis Green, Wm. H. Odiorne, Anna J. Dodge, impleaded as McTucker; Daniel L. Hafner, Henry W. Morris, Jessie David (impleaded as McTucker), Eliza Davis, John L. VanEvery, Harriet A. Dickason, Wm. A. Gordon, Wm. Glasscock, Walter Scroggan.

The following named respondents took no part whatever in procuring the legislation aforesaid, or the formation of either of the said Drainage Districts or in any of the proceedings in the County Court of Pike County, Illinois, or in procuring the adoption of said assessments, or in the sale or issue of said bonds, but each of said respondents did acquire title to some of the lands in said original levee district, by purchase or inheritance but the persons from whom said lands were so derived and who owned the same at the time when the proceedings so occurred were not parties thereto nor did they participate therein, and said respondents so named when they acquired their titles respectively had no notice whatever of the lien, equitable or otherwise, on said 180 lands or the claims of complainants to such lien as is set forth on pages 37 and 38 of their original answer: Charles M. Alger, George Anderson, John Blaul, Mary E. Baker, I. Byron, John Cole, A. E. Clark, Charles P. Clifford, Frank P. Canterbury, Thomas Davis, William Durwin, Henry F. Davis, Sarah E. Delano, Alfred M. Delano, John H. Douglas, Simon Daub, William H. Fisher, Tyra A. Hayden, Charles Hansen, J. T. K. Hayward, Adam Hilton, John R. Hellius, Etta Hardin, William C. Hardin, William H. Hatch, Harvel Jordan, Isaac Lindley; George M.

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James, Alexander C. James, Jesse H. Rector, Administrators of John D. James, deceased; D. M. Morris, Henry Merrill, Wm. M. Merriweather, F. C. McCown and A. R. McCown, Executors of A. R. McCown, deceased; Mary F. McTucker, John J. McCune, William McIntosh, Joseph M. McIntosh, Andrew J. Newland, N. W. Northcutt, Fred Naxera, John Penn, Elmer H. Packard, Mary A. Post, W. W. Pierce, John O. Roberts, Joseph Rowe, Charles F. Smith, Abner Shinn, P. O. Sharpless, William Shively, J. W. Stark, Edward C. Schmidt, Mary B. Smith, Richard Schmidt, Sarah B. Selmes, Lucy P. Wiggins, Joseph M. Thurman, Joseph T. Zook.

The following respondents never had anything to do with any of the proceedings in the bill alleged and never participated therein or even consented thereto, and never joined in any
181 of the proceedings alleged in the present bill to have been taken by any of said land-owners as is set forth on page 41 of the original answer: Charles M. Alger, George Anderson, John Blaul, Mrs. Mary E. Baker, I. Byron, John Cole, A. E. Clark, Charles P. Clifford, Charles N. Clark, Frank P. Canterbury, Thomas Davis, Alfred M. Delano, Frank Davis, Sarah E. Delano, Thomas Davis, John H. Douglas, Edward Davis, Simon Daub, Ella Davis, John H. Franklin, Andrew Davis, Wm. L. Foote, Mrs. Fanny Davis Hilton, heirs of J. T. Davis, deceased; William H. Fisher, Wm. Lausen, not found in bill, holds trust deed on Fisher's land; Jacob Fisher, Edward A. Glenn, Catherin S. Harvey (mortgagee), Tyra A. Hayden, John T. K. Hayward, Charles Hanson, Mrs. Etta Hardin, Adam C. Hilton, John R. Helmes, William C. Hardin, William H. Hatch, Harvel Jordan, Isaac Lindley, George M. James, Alexander C. James and Jesse H. Rector, administrators of John D. James, deceased; D. M. Morris, Henry Merrill, Wm. M. Merriweather, F. C. McCown, and A. R. McCown, executors of A. R. McCown, deceased; Mary F. M. McTucker, Joseph McIntosh, John J. McCune, Wm. McIntosh, Andrew J. Newland, N. W. Northcutt, Fred Naxera, John Penn, Elmer H. Packard, Mrs. Mary A. Post, W. W. Pierce, John O. Roberts, Joseph Rowe, Charles F. Smith, P. O. Sharpless, Wm. Shively, J. W. Stark, Edward C. Schmidt, Sarah B. Selmes, Richard Schmidt, Mrs. Mary B. Smith, Richard Stillwell,
182 Fanny C. Stillwell, Widow of A. J. Stillwell, Mary Stillwell, Harold Stillwell and heirs of A. J. Stillwell, deceased; Earl Stillwell, Abner Schinn, Joseph M. Thurman, Lucy R. Wiggins, Joseph T. Zook.

Answer of non-reside defendant represente Hay, Gree Humphry.

And these respondents aver except so far as the particular statement herein contained as to their alleged participation or non-participation in the acts—proceedings and measures alleged in said bill and answer are concerned, the said answer so adopted by them is in all things full and true.

And these respondents having fully answered separately pray as in the answer adopted by them is already prayed.

Hay, Greene & Humphrey,
Solicitors for said Defendants.

[Indorsed.]

Filed January 7, 1891.
James T. Jones, Clerk.

And afterwards, to-wit, on said 7th day of January in the 183 January Term of said Court in the year last aforesaid the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael W. O'Brien, Francis F. Palms & Clothilde Palms, executors, etc., and Albert Blair,
Complainants,
vs.
John G. Wheelock et al.,
Defendants.
} In Equity.

Order that Albert L. All and others m adopt answer Wheelock an othe

Now on this day comes Albert L. Allen and others, defendants in said cause by Hay, Greene & Humphrey, their solicitors, and show to this Court that they have been brought in recently into Court by publication in said cause. That John G. Wheelock and a large number of other defendants have already answered the bill of complaint that the defendants represented by said solicitors are very numerous and the answers necessarily of great length. It is on motion of said Allen and others, defendants, now about to answer by said solicitors, ordered, that said Allen and all others who shall be represented in said cause by said Hay, Greene & Humphrey as their as their solicitors and who shall so desire may separately or jointly and separately adopt the answer of said Wheelock and others already filed or such portions thereof as they shall be advised; and may add thereto such other matters as the nature of their defences may require. This order is made in

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order to avoid unnecessarily encumbering the record. And the said answer of said Wheelock and others when so adopted or to so much thereof as shall be so adopted, shall stand as the answer or part of the answer, of each separate defendant who shall adopt the same.

191 And afterwards to-wit on the 25th day of March in the January term of said Court in the year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record to-wit:

Michael W. O'Brien et al.
Complainants,
vs.
John G. Wheelock et al.,
Defendants.
} Sny Levee District Bond Case.

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wer to stand

On reading and filing the stipulation in this cause, and on motion of Messrs. John M. and John Mayo Palmer, solicitors for Complainants, it is ordered, that the bill of complaint in this cause be, and the same is hereby amended by adding thereto, as party defendants, the following named persons: Mary E. Baker, Frank Davis, Edward Davis, Ella Davis, Andrew Davis, and Fanny Hilton, William Lausser, William L. Foote, William A. Gordon, George Anderson, T. Byron, William Derwin, John H. Douglas, Simon Daub, Jacob Fisher, John Gordon, Joseph McIntosh, N. W. Northcote, W. B. Pettibone, Richard Schmidt, John R. Helms, William H. Miller, F. C. McCann and A. R. McCann,
192 administrators of the estate of A. R. McCann deceased, Mary A. Post, Edward C. Schmidt, Albert G. Hamlin, Elma H. Packard, John O. Roberts, Sarah B. Selmes, The Board of Trustees of Township 3 Range 8.

And it is further ordered, that the answers of said above named defendants and the replications to said answers heretofore filed in this cause to stand, the same in all respects as though they had been filed after the said amendment to said bill was made.

Now afterwards to-wit, on the 3rd day of July in the June term of said Court in the year 1891, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael O'Brien et al.,
Complainants.
vs.
John G. Wheelock et al.,
Defendants.
} Sny Levee District Bond Cases.

Order appointing Thomas H. Cheney Special Master

Now comes the complainants by John M. Palmer, their so-
193 licitor, and moves the court for an order appointing Thos. H. Cheney, a citizen and resident of the City of Springfield, in said district, as special Master in Chancery to take and report to the court all evidence in said cause.

And it appearing to the court that a large number of said defendants represented by Hay, Greene & Humphrey agree to the entering of such an order, and there being no known objections from any of the parties to said cause to the entry of such order; and the court being fully advised in the premises, it is ordered, adjudged and decreed by the court that the said Thos. H. Cheney be and he is hereby appointed special Master in Chancery to take and report to the Court all the testimony in said cause; and as such special Master the said Cheney shall proceed to take said testimony at such times and at such places either within said district or elsewhere, as the said Master shall deem most convenient for said parties in interest, and before taking said testimony said Master shall in each instance give due and reasonable and proper notice to all of said parties, both complainants and defendants or to their solicitors of the time and place where such testimony or any part thereof will be taken; and upon the conclusion of all such testimony that any of the parties herein may desire to offer, said Master shall report the same to this court.

And afterwards to-wit, on the 26th day of August in the year last aforesaid came J. S. Irwin and others, defendants, by Messrs. Hay, Greene & Humphrey their solicitors, and filed in the Clerk's office of said Court their amendment to answer filed herein, which said amendment is as follows, to-wit:

In the Circuit Court of the United States.
For the Southern District of Illinois.

In Equity.

Michael O'Brien et al., Complainants.
vs.
John G. Wheelock et al., Defendants.
Bond Cases.
Sny Levee District

194 Amendment to answer filed by defendants represented by Hay, Greene & Humphrey.

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6, 1891.

The following named defendants by leave of court file this their amendment to the answer before filed by them in the above entitled cause.

They respectfully show to the court that they are now severally the owners of certain lands within the district specified in the bill of complaint, claiming the same under various valid tax titles, holding deeds for said titles made to them by the parties under whom they claim by the officers lawfully thereunto empowered under valid judgments rendered for unpaid taxes. And they severally set up such titles as against any claim of complainants under the bill aforesaid.

The defendants in this behalf named file herewith a table showing the date of the various tax titles or deeds aforesaid, with a description of the land embraced therein, and showing also when said lands were sold for taxes and by whom and to whom such deeds were issued which table they make part of this amendment. And they allege such titles as against any claim of complainants herein. And they severally pray as in the original answer they have already prayed. The defendants make this amendment named in the said list appended as aforesaid as the present owners of the tracts of land set opposite their respective names.

Hay, Greene & Humphrey for Defendants so named.

Present Owner.	Grantee in Tax Deed.	Description.
J. S. Erwin	Edward Prince	S. E. 9 & 5
Vol. 97 Page 525	date of sale June 6, 81	Date Deed Aug. 18, '83, Dec. 8, '84, Feby.
Wm. Livingston	R. M. Atkinson	E. ½ S. E. 32, 6, 5.
Vol. 89, 312	Date of sale May 23, 70	Nov. 22, '72, Dec. 8, '74.
A. J. Lovell	A. J. Stillwell	22½ a W. Part N. W. N. W. 21, 7, 4.
Vol. 104, Page 500	Date of sale June 6, 81	Sept. 27, 83, Sept. 28, 83.
Julia A. Lyon	J. H. Dickuson	S ½ S. W. 35, 4, 7.
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Vol. 97, Page 557	Date of sale June 1, 85	Sept. 14, 87, Dec. 24, 87.
Julia A. Lyon	J. H. Dickason	N. E. & N. W. 3, 5, 7.
Vol. 97, Page 557	Date of sale June 1st, 85	Sept. 14, 87, Dec. 24, 87.
Julia A. Lyon	J. H. Dickason	N. ½ S. W. 2, 5, 7.
Vol. 97, Page 557	Date of sale June 1, 85	Sept. 14, 87, Dec. 24, 87.
E. G. Lyon	E. G. Lyon	N. W. N. E. 2, 5, 7.
Vol. 97, Page 567	Date of sale June 6, 87	March 4, 90, March 4, 90.
L. P. & W. A. Munger	C. B. Dustin	N. W. 36, 5, 7.
Vol. 97, Page 526	Date of sale June 6, 81	Dec. 24, 83, Jan. 1, 84.
L. P. & W. A. Munger	R. M. Atkinson	S. W. 1, 6, 7.
Vol. 75, Page 167	Date of sale June 25, 66	Dec. 24, 68, Dec. 24, 68.
L. P. & W. A. Munger	A. J. Stillwell	N. W. 2, 6, 6.
Vol. 104, Page 500	June 6, 81	Sept. 22, 83, Sept. 26, 83.
J. J. McCown et al.	R. M. Atkinson	17 acres S. end N. W. 35, 6, 6.
Vol. 89, Page 312	Date of sale May 23, 1870	Nov. 22, 72, Dec. 8, 74.
Silas W. Mackey	James L. Mackey	52, 61, A. S. W. 27, 7, 5.
Vol. 89, Page 569	Date of sale June 25, 66	Aug. 5, 68, April 13, 75.
James Musgrove	James S. Hyde	100 A. E. side N. E. 29, 5, 6.
Vol. 81, Page 264	Date of sale Nov. 14, 1871.	Nov. 14, 71, Nov. 14, 71.
A. R. McCown	R. M. Atkinson	N. W. 3, 6, 6.
Vol. 81, Page 272	Date of sale Nov. 16, 71	Nov. 21, 71, Nov. 23, 71.
J. A. Nelson	A. J. Stillwell	N. W. S. E. 15, 5, 7.

Amendment to answer of defendants represented by Hay, Greene&Littler Filed Aug. 26, 1891

Present Owner.	Grantee in Tax Deed.	Description.
Vol. 104, Page 500	Sale June 6, 81	Sept. 22, 83, Sept. 26, 83.
Fred Naxera Vol. 97, Page 526	Wm. H. Myers Date of sale June 6, 81	N. E. 12, 7, 6. June 21, 83, Jan. 29, 84.
Elijah Petty Vol. 80, Page 102	Elijah Petty Date of sale May 20, 67	85 acres W. side N. E. 15, 6, 6. June 23, 70, Dec. 23, 70.
J. A. Pierce Vol. 97, Page 560	H. T. Shaw Date of sale Aug. 20, 85	Pt. S. W. N. E. 13, 7, 6. April 2, 88, April 2, 88.
196		
A. D. Reichel Vol. 77, Page 531	A. R. Quimby Date of sale June 25, 66	N. W. 7, 7, 5. Dec. 16, 68, Aug. 30, 70
James D. Rupert Vol. 81, Page 273	R. M. Atkinson May 17, 69	N. W. N. E. 2, 7, 6. Nov. 21, 71, Nov. 23, 71
James D. Rupert Vol. 75, Page 167	R. M. Atkinson Sale 25 May, 66	S. ½ N. W. 2, 7, 6. Dec. 24, 68, Dec. 24, 68.
J. W. Speny Vol. 91, Page 145	R. M. Atkinson Sale June 10, 72	N. W. 28, 4, 7. April 23, 77, April 24, 77.
J. W. Speny Vol. 91, Page 515	R. M. Atkinson Sale June 17, 80	N. E. 28, 4, 7. June 29, 85, Feb. 20, 83.
Theopolis Snyder Vol. 85, Page 368	A. C. Mathews Sale Oct. 9, 73	N. W. S. W. 13, 6, 6. Oct. 9, 73, Dec. 4, 73.
C. R. Shaw Vol. 89, Page 312	R. M. Atkinson Sale May 27, 70	S. W. 18, 6, 5. Nov. 22, 72, Dec. 8, 74.
W. D. & A. Shinn Vol. 89, Page 341	E. M. Seeley Sale May 24, 69	N. W. 30, 6, 5. Nov. 21, 71, Dec. 28, 74.
Wike & Higbee Vol. 97, Page 506	Wm. L. Myers Sale June 4, 77	S. W. 33, 5, 6. June 9, 79, July 21, 79.
Sol Yokem Vol. 104, Page 500	A. J. Stillwell Sale June 6, 81	S. W. N. E. 3, 7, 5. Sept. 22, 83, Sept. 26, 83.
Henry Yokem Vol. 97, Page 526	C. B. Dustin Sale June 6, 81	80 acres S. Pt. N. W. 2, 7, 5. Dec. 24, 83, June 1, 84.
Catharine Schleiker Vol. 97, Page 543	Sny L. Conors Sale June 4, 83	S. ½ S. W. 2, 5, 7. Oct. 3, 85, May 22, 86.

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Amendment to answer of defendants represented by Hay, Greene&Littler Filed Aug. 26, 1891.

Present Owner.	Grantee in Tax Deed.	Description.
B. H. Atkinson	B. H. Atkinson	N. E. 14, 5, 7.
Vol. 97, Page 515	Sale June 14, 80	Jany. 29, 81, Feb. 20, 83.
B. H. Atkinson	R. M. Atkinson	33.64 A. Fractl. S. W. S. E. 22, 5, 7.
Vol. 81, Page 273	Sale May 24, 69	Nov. 22, 72, Dec. 8, 74.
B. H. Atkinson	R. M. Atkinson	N. E. 7, 6, 6.
Vol. 81, Page 84	Sale June 5, 68	April 21, 77. April 24, 77.
B. H. & H. B. Atkinson	G. M. Atkinson	N. E. 19, 6, 5.
Vol. 97, Page 571	Sale June 4, 88	May 20, 91, May 22, 91.
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B. H. Atkinson	R. M. Atkinson	S. W. 30, 7, 4.
Vol. 89, Page 312	Sale May 23, 70	Nov. 22, 70, Dec. 8, 7, 4.
G. M. Atkinson	R. M. Atkinson	Balance S. W. conveyed to C. R. Shaw, 25 A. N. side S. W. 18, 6, 5.
Vol. 89, Page 312	Sale May 23, 70	Nov. 22, 70, Dec. 8, 74.
B. H. Atkinson	R. M. Atkinson	S. W. 3, 6, 6.
Vol. 95, Page 568	Sale May 25, 68	May 23, 70, Jan. 23, 80.
B. H. Atkinson	F. M. Casal	S. W. 11, 5, 7.
Vol. 97, Page 530	Sale June 6, 81	June 2, 84, June 4, 84.
Noble Dyke	A. J. Stillwell	N. ½ S. E. 24, 5, 7.
Vol. 104, Page 500	Sale June 6, 81	Sept. 22, 83, Sept. 26, 83.
Jacob H. Dickason	Shinn & Wilton	Part Lot 2 Mid. S. W. 7, 4, 7.
Vol. 82, Page 208	Sale May 23, 70	June 22, 72, July 23, 72.
Jacob H. Dickason	A. J. Stillwell	N. E. 26, 5, 7.
Vol. 104, Page 500	Sale June 6, 81	Sept. 22, 83, Sept. 26, 86
O. J. Edmonds	Sny I. L. Dist.	S. E. N. E. 3, 7, 5.
Vol. 109, Page 478	June 4, 83	June 3, 86, June 3, 86.
W. H. Gay	R. M. Atkinson	S. W. 24, 6, 6.
Vol. 91, Page 145	Sale May 20, 72	April 23, 79, April 24, 77.
W. H. Gray	R. M. Atkinson	N. W. 25, 6, 6.
Vol. 81, Page 273	Sale May 24, 69	Nov. 21, 71, Nov. 21, 71.
J. C. Gay	Mary Horton	N. ½ S. E. 2, 6, 6.
Vol. 100, Page 549	Sale June 13, 81	July 26, 81, July 28, 81.
C. E. & James Gay	C. B. Dustin	80 A. S. Pt. N. W. 2, 7, 5.

Amendment to answer of defendants represented by Hay Greene & Littler. Filed Aug. 26, 1891.

Present Owner.	Grantee in Tax Deed.	Description.
Vol. 97, Page 226	Sale June 6, 81	Dec. 24, 83, Jan. 1, 84.
Ida E. Irwin	Nathan Kelley	S. W. 15, 7, 5.
Vol. 82, Page 477	Sale May 24, 71	Nov. 22, 71, Jan. 16, 83.
O. M. Hatch	O. M. Hatch	N. E. 4, 6, 6.
Vol. 97, Page 559	Sale Aug. 26, 1867	May 14, 74, Feb. 24, 88.
Mary Horton	H. S. Horton	34½ A. N. side N. ½ N. W. 1, 6, 6.
Vol. 85, Page 462	Sale May 22, 71	Feb. 18, 74 Feb. 18, 74.
D. D. Hicks	D. D. Hicks	N. W. 7, 5, 6.
Vol. 97, Page 537	Sale June 4, 83	June 10, 85, July 8, 85.
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John McDonald	John McDonald	S. W. 2, 8, 4.
Vol. 1, Page 527	Date Jan. 4th, 76	
County Clerk	John McDonald	N. W. 3, 8, 4.
Vol. 1, Page 553	Sale June 26, 76	
County Clerk	John McDonald	N. W. 11, 8, 4.
Vol. 1, Page 553	Sale June 26, 76	
County Clerk	Stephen McDonald	N. W. 2, 8, 4.
Vol. 2, Page 178	Sale June 22, 87	
County Clerk	John McDonald	N. E. 10, 8, 4.
Vol. 2, Page 180	Sale June 22, 77	
County Clerk	John McDonald	N. E. 24, 8, 4.
Vol. 2, Page 327	Sale Dec. 20, 78	
County Clerk	Levi Davis	S. W. S. W. 12, 8, 4.
Vol. S, Page 429	Sale Jan. 3, 89	
County Clerk	John H. Cushman	N. E. S. E. 15, 8, 4.
Vol. S, Page 97	Sale Sept. 12, 83	
County Clerk	John McDonald	N. E. 25, 8, 4.
Vol. 2, Page 534	Sale June 4, 81	
County Clerk	John H. Church	Esd. dt. pt. N. W. 23, 8, 4.
Vol. S, Page 97	Sale Sept. 12, 83	
County Clerk	Stephen McDonald	S. E. 24, 8, 4.
Vol. S, Page 186	Sale Dec. 11, 84	
County Clerk	Levi M. Davis	N. W. S. E. 15, 8, 4.
Volume S, Page 295	Sale July 5th, 86	

(Indorsed): Filed August 26, 1891. James T. Jones, Clerk.

Order Allowing James S. Irwin and other Defendants to Amend Answer.—Order on Parties to close Testimony etc. 55-58

And afterwards to-wit on said 26th day of August in the June Term of said Court in the year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

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Michael W. O'Brien et al.,
Complainants,
vs.
John G. Wheelock et al.,
Defendants.
} In Chancery.

Order allowing James S. Irwin and other defendants to amend answer

Now on this day comes James S. Irwin and certain others of the defendants in said cause whose names are appended to a list filed on this day and pray leave of Court to amend their answers herein, and it having been shown to the Court that due notice of said application has been given to counsel for complainants, it is ordered that said defendants have leave to file their amendment which is now presented to the Court together with the exhibit annexed thereto, and that said amendment and exhibit stand as a portion of the answer of the several defendants filing the same.

Then afterwards to-wit, on the 24th day of June in the June Term of said Court in the year one thousand eight hundred and ninety-five the following further proceedings were had in said Court in said cause and entered of record to-wit:

Michael W. O'Brien et al.,
Complainants,
vs.
John G. Wheelock et al.,
Defendants.
} In Chancery.

Order on parties to close testimony and setting cause for hearing.

This day come the parties by their solicitors and by consent it is ordered by the Court that the complainants close their testimony in this cause by the first day of August next; that the defendants close their testimony by the 15th day of September next, and that the complainants take their testimony in rebuttal by the 15th day of October next.

It is further ordered that this cause be set for hearing on Tuesday the 5th day of November next.

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In the Circuit Court of the United States.
For the Southern District of Illinois.
In Equity.

Michael W. O'Brien et al., vs. John G. Wheelock et al., } Sny Levee District Bond Cases.

Testimony in the above entitled cause pursuant to order of reference of this Court made July 3rd, 1891, taken at the City of Pittsfield, Illinois, on the 18th day of August, 1891, by Thos. H. Cheney, Special Master, on the annexed notice of complainants.

Appearances:

Senator John M. Palmer for complainants.

H. S. Greene and Orr & Crawford for defendants.

Complainants offer a series of records, papers, etc., appertaining to the County Court of Pike County, in evidence, and it appearing that the same documents have been printed in pamphlet form, it is stipulated, that after said pamphlets shall have been compared with the original and ascertained to be correct, that such pamphlet shall be received in the same way and to the same effect as if it were the original records of the County Court of Pike County, defendants reserving to themselves all objections which they could properly make to an original if offered, and also as to the effect of anything in said papers as either competent or satisfactory evidence. Complainants here offer in evidence a book marked "Ex. A" on the first page of which appears the signature of the Special Master, and which purports to be a copy of a book referred to on page 10 of the present supplemental
201 bill. It is stipulated that said copy shall be admitted in evidence with the same force as the original, defendants reserving all objections that they might make to the original as to the effect of such book or anything appearing thereon, and the sufficiency of the original as evidence, also as to relevancy and competency, subject to comparison with the original.

Here complainants offer in evidence a number of documents, and it is stipulated that the said documents shall be admitted in evidence in the same way that the originals might, subject however to all rights of the defendants and all objections as to their rele-

vancy and the effect of said papers and each of them as a matter of evidence, said papers being as follows, to-wit:

Report of testimony Thomas Cheney.

The original proceedings in this cause as therein admitted by the pleadings; that in the case of Palms against Wheelock and complainants will file a specific statement of them; all files, orders and court entries in the original cause of Francis Palms against John G. Wheelock and others, commissioners, in the Circuit Court of the United States for the Southern District of Illinois.

Defendants here object to the relevancy and materiality of each and all of said files, records and orders, on the ground following: That the parties in the said cause from which said files orders, etc., are taken are not the same as those in the present cause, and because also said files, records, etc., are not relevant to the issue in this case.

Gov. Palmer: Now I want to introduce as against certain parties—I want to introduce as against the First National Bank of Salem, North Carolina, Curtis Guild, J. W. Daniells, I. F. Kimball, Horatio Smith, William Goddard, Daniel Gay, A. Grannis, Alice Ducharme, C. VanHuson, Sarah Ann Smith, Andrew Moody, E. P. Kimball, J. K. Lord, N. R. Stidman, Albert
202 Blair, Amos J. Stillwell, John E. Stillwell, John H. Garth, David Dubach, Margaret A. Stillwell, John A. Stillwell, Jessie A. Stillwell, Mabel Stillwell and Mary A. Stillwell; they were parties to the original suit and declined to be a party to this; I want to introduce the petitions filed by them in the original cause by those particular parties, they all filed petitions in the original cause and were parties to those proceedings and I want all the petitions they filed to become a part of this cause.

Defendants, the heirs and representatives of A. J. Stillwell deceased, object to the relevancy and competency of the files and instruments last mentioned.

Gov. Palmer: I suggest the death of Amos J. Stillwell about the 1st of January, 1889, and that Richard H. Stillwell is his administrator appointed by the County Court of Marion County, Missouri.

It is hereby stated that the only defendants in said cause now appearing and on behalf of whom all objections heretofore and hereafter to be made are taken, are such as are represented by Orr & Crawford and Hay, Greene & Humphrey; no stipulation is made binding parties not represented by the above named counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Michael W. O'Brien, et al., Executors &c. of the last will of Francis Palms, et al., vs. John G. Wheelock, et al. } Cause No. 431.

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It is hereby stipulated between the appellants and the appellees, who are represented by Messrs. H. S. Greene, J. Otis Humphry, A. C. Matthews, Harry Higbee and Thomas Worthington and of the appellees represented by Jefferson Orr and A. G. Crawford, in this cause, that the annexed abstract of testimony is a full, complete, true and correct abstract of all of the testimony taken in this cause and used at the hearing thereof in the court below except the deposition of E. L. Corthell, that the same together with said deposition of said Corthell contains in substance and in fact the testimony taken in this cause in the Court below and upon which the case was heard in the Circuit Court. And it is further stipulated that an order in this cause may be entered substituting for the purpose of printing the record of said abstract and said deposition of said E. L. Corthell for the testimony reported in extenso by the Master in said cause being that portion of the transcript of appeal between page 200 and page 2240; but this stipulation relates only to oral testimony of witnesses sworn and examined in the progress of the cause, as reported in said transcript, and shall not be held to exclude any documentary evidence sent up under the order of Judge Allen of April 28th, 1897, or included in any other stipulation of the parties represented by the above counsel in this cause.

Dated January 20th, 1898.

HENRY M. DUFFIELD,
Counsel for appellants.
H. S. GREEN,
J. O. HUMPHRY,
A. C. MATTHEWS,
HARRY HIGBEE,
THOS. WORTHINGTON,
Counsel for appellees named in answer filed by them.

A. G. CRAWFORD,
JEFFERSON ORR,
Counsel for appellees named in answer filed by them.

Filed Jan. 20, 1898. OLIVER T. MORTON, Clerk.

1*a* IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Michael W. O'Brien, et al., Executors of the Last Will of Francis Palms, deceased, Complainants. vs. John G. Wheelock, et al., Respondents. } In Equity. Sny Levee Bond Case.

Taken before Thomas H. Cheney, Special Master, beginning August 18th, 1891. Appearances, Senator John M. Palmer for complainant, H. S. Greene & Orr & Crawford for defendants.

COMPLAINANTS' EVIDENCE.

Records, &c. etc. offered evidence.

Complainants offer certain records, files, etc., of the County Court of Pike county, Illinois, and it appearing that the same documents had been printed in pamphlet form, it is stipulated that said pamphlet shall first be compared with the original and ascertained to be correct, and that said pamphlet shall be received in the same way and to the same effect as if it were the original records of the County Court of Pike county, defendants reserving to themselves all objections that could be made to the original, if offered.

2*a* Complainants offer in evidence Exhibit "A" on the first page of which appears the signature of the Special Master, which purports to be a copy of the book referred to on page 10 of the present supplemental bill.

It is stipulated that said copy shall be admitted in evidence with the same force as the original, defendant reserving all objections that might be made to the original, as to the effect of such book or anything appearing thereon. Complainants offer in evidence original proceedings in this case as therein admitted by the pleadings, that is, in the case of Palms vs. Wheelock, et. al., and a specific statement of said papers to be filed herein; also the files, orders and court entries in the original case of Palms vs. Wheelock, et. al., commissioners, in the Circuit Court of the United States for the Southern District of Illinois.

Defendants object to the relevancy and materiality of all such files, records and orders, on the grounds following: That the parties in said case from which said files, orders, etc., are taken

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are nor the same as those in the present case; and because, also, said files, records and orders are not relevant to the issue of this case.

Complainants introduced as against the First National Bank of Salem, North Carolina, Curtis Guild, J. W. Daniels, I. T. Kimball, Horatio Smith, William Goddard, Daniel Day, A. Grannis, Alice Ducharme, C. Van Huson, Sarah Ann Smith, Andrew Moody, E. P. Kimball, J. K. Lord, N. R. Stidman, Albert Blair, Alos J. Stillwell, John E. Stillwell, John K. Garth, David Dubach, Margaret A. Stillwell, John A. Stillwell, Jesse A. Stillwell, Mabel Stillwell and Mary Stillwell, who were parties to the original suit and declined to become parties to this suit the petitions filed by them in the original suit (with all the objections they filed to becoming parties to this cause). Defendants, the heirs and representatives of A. J. Stillwell, deceased, object to the relevancy and competency of the files and instrument last mentioned.

3 *a* Governor Palmer: I suggest the death of Amos J. Stillwell, about the first of January, 1889, and that Richard H. Stillwell is his administrator.

All objections made and stipulations entered into are on behalf of these parties defendant in this case now represented by Hay, Greene & Humphrey and their associates and Orr & Crawford.

imony of . Clark.

C. N. CLARK, being called for complainants, testified as follows in answer to interrogatories propounded by Gen. John M. Palmer:

I reside in Hannibal, Missouri, came there in April 1865; am acquainted with the Sny Island District. First became acquainted with it in 1870, when I first acquired land which was a fractional 80 acre tract in Sec. 7, Tp. 4 south and range 8 west. In 1871 a bill was presented to the Legislature with reference to the draining of this land, which became a law on the 24th of April, 1871. The lands were subject to overflow from the Mississippi river. I investigated whether these lands known as the Sny Island District could be reclaimed and talked with some few land owners, especially with Noah Rouse, who called me especially to it, and Henry W. Morris, who were landowners and I concluded that the lands were capable of reclamation. I consulted with O. H. Browning of Quincy, an eminent lawyer, and made examination myself from which I learned there was no law then in force in Illinois under which these lands could be reclaimed. I met Mr. Browning,

Mr. Underwood, Mr. Hurd, who was commissioner for the revision of the Statutes of Illinois, and others in 1870 and 1871, at Springfield, and they prepared the bill which finally became a law on April 24th, 1871. Up to this time I don't think I talked with any other landowners on the subject, but might have done so.

4*a* After the introduction of the bill some small contributions of money were made by the gentlemen named and few others. Mr. Rouse and Mr. Morris gathered up a little money and gave me to pay my expenses. (Witness identifies "Subscription Contract of the Mississippi Levee Drainage Company.") This was an organization subsequent to what I have now testified about but organized for the purpose of carrying into effect the bill just mentioned.

Said paper offered in evidence; objected to by defendants on the ground of not being relevant to the issues, etc.

It states that the subscribers to said Company, for the number of shares set opposite their names, at $100 per share, agree to pay said sum as follows: Two and a half per cent. at the time of subscribing and the balance as it shall be called for by the contractors, provided 30 days notice shall be given of such call. The signatures to the paper are genuine; I obtained them. Certain public meetings were held before the proceedings were commenced in the Pike county court for the organization under the law of 1871. The first was at the barn of S. M. Spencer near Payson, in Adams county, about the time or date of that subscription paper. It was an informal meeting, not organized, and I did all the talking. I read the law that had just been enacted and explained its provisions as I understood it. My plan was to organize this company and raise sufficient money through that means from the landowners who signed it to do the preliminary work necessary to be done prior to the steps taken by the County Court. Not more than six or eight of these who signed the paper were present at that meeting. All the signers were landowners. The place where this first meeting was held was near Payson, two or three miles from the levee district. The second meeting was held at Kinder-

5*a* hook some days subsequent and other names were secured. Kinderhook is on the bottoms, on the Wabash railroad and adjacent to lands in the Levee District; don't think the proceedings of the first meeting were published. The second meeting was similar to the first. Can't say whether its proceedings were published or not. The third meeting was held at New Canton a few days after the second; this is south of Kinderhook and on the bottom adjacent to the Levee District. Don't know whether the meeting

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was organized; I officiated as the organizer generally and did all the talking. They were there to hear what I had to say. Possibly M. D. Massie might have been elected chairman. The next meeting was at Rockport, still further down the bottom, and right adjacent to the Levee District, and the next meeting was at Pleasant Hill, which is still further down, and adjacent to the lower part of the district. None of these places are included in the lines of the Levee District. I think all these meetings except the one at Payson were noticed by handbills six or eight inches square. There was no crowd at any of these meetings; I think the bulk of the signatures found on that paper were at the various meetings. The lands are not owned in small districts generally, but in large parcels. At the meetings I explained the object and in each case read the law of 1871, and explained its provisions; the object of the meetings was to raise money to do the preliminary work. Pleasant Hill is the lowest southern point in the county. There were no meetings in Calhoun county; but Mr. A. G. Chamberlain and myself talked with some parties there; with Mr. Smith, Mr. Jennings, I think, and Mr. Henry. There was but a small part of the lands in the Levee District lying in Calhoun county.

More or less articles appeared in the Hannibal Courier in relation to the proposed work, and gave something of the steps as they progressed. I don't now recollect any person not land
6 *a* owners in the district with whom I had communication. I meant to see all who owned any considerable amount of land; that was my intention, and generally carried out, I think. At the time I circulated that subscription paper I circulated a petition or application to the Pike county court for the organization of the district under the law of 1871. This organization referred to was preliminary to the intended application to the county court for the organization of the drainage district. It was so understood. Mr. John G. Wheelock was one of the commissioners appointed by the county court. His land was located at the upper portion of the district in townships 4—8 and 4—7.

The other commissioners were George W. Jones and William Dustin. Mr. Jones didn't own any land at that time; Mr. Dustin did, his land being in Atlas township. The jury when appointed assembled to perform their duties at Pittsfield, where they were sworn in, and went from there to the district. They didn't meet the land owners; it was not their business; it was their business to view this land and assess the benefits. I was with the jury all the time.

The Levee District commences on t! e north in Adams county at a point nine miles south of Quincy and extends through Pike county into Calhoun county, a distance of about nine miles after you cross the line of Calhoun county; the whole length is about fifty-two miles. The district varies in width from three to six miles. The jury finally assembled at Hannibal, and there, mounted on horses, crossed the river and went to the head of the Sny and the head of the proposed levee; the jury then rode south along the eastern bank of the river to Calhoun county and returned by way of the Bluffs road, coming north to the Wabash road, where they disbanded. The party consisted of a jury of
7*a* twelve. Mr. Corthell the engineer and myself. Others occasionally along who were interested. We didn't visit the land owners on this trip; might possibly have stopped for a drink of water, but were supplied with rations on the trip by the steamer "Ella," a ferry boat which accompanied us on the trip and ferried us over streams, etc., running on the Mississippi. We were about three days on the trip. On our return we took quarters with the farmers or wherever we could find entertainment. Went whole way down and back, being from 3 to 6 miles from river.

Ground was broken for beginning the levee in September, 1872, about four miles up the river from Hannibal. This was a little over two and a half miles from the upper end of the levee. The work was afterwards extended north. Work ceased on the levee late in the winter of 1874. A large number of mns were employed; the contractors sub-let the work, and the forcee were distributed along for miles. There were a large number of men. I should say fifty or sixty commenced in 1872. The dirt was moved by scrapers. In the fall of 1872 work was done all the way down to the cut-off, about eight miles below Hannibal. Work stopped in the winter of 1872. About twelve miles of the levee was begun during the fall and winter of 1872; some work might have been done south of the point indicated, but in no considerable amount. The number of men employed probably varied from 100 to 300. There were camps and shanties built out of boards, and some tents and places for boarding people, blacksmith shops for repairing tools; in other words a regular contractors' camp along the levee. At that time, in 1872, there were a number, perhaps a half dozen, of these camps; many were small contractors. After 1872 I was not so familiar with the work, having left its personal supervision. It was prosecuted at convenient times late in the fall of
1874, and in that winter the ground was frozen so deep that
8*a* some blasting was necessary at the extreme lower end. In 1873 the work was prosecuted at different points by men and

teams. A large number of men were employed all the way down. The work never was finished. Work ceased on the levee late in the winter of 1874–5. Cold weather interrupted the work. The original contractors failed to perform their contract and the work was delayed. There was a time when it was discovered that the funds first raised were insufficient, but I am not able to give the date. I had to do with making the additional assessment, but I can't tell whether I circulated the petition or not, more than likely I did. I did the work of posting the notices for that assessment in each congressional township. In my affidavit I stated that I circulated the petition, which I think is correct, though I don't remember. During the progress of the work there were cessations during the winter months, but it was prosecuted during the spring and summer months generally when the funds were ready. Generally, boarding houses and things of that sort were located for the laborers during the progress of the work. Boarding tents were put up at different places along, and blacksmith shops and the paraphenalia of a grading camp.

Cross-Examination by Mr. H. S. Greene.

It is stipulated that both parties shall be understood as objecting to every question asked, to be continued through all the testimony.

"An act to provide for the construction and erection of drains' ditches, levees and other works," became a law on the 4th of April 1871, and is that under which the first organization was perfected for the purpose of reclaiming the Sny lands. It is referred to near the foot of page 10 of the supplemental bill in this case. I began to act in the summer of 1870 in the matter of reclaiming the Sny lands. I really didn't act with any one, except so far as to ask 9 *a* questions and get information. I applied myself and investigated the condition of these lands in regard to the quantity and capacity for drainage, etc. I worked independent of anybody. I went to Springfield in the winter of 1871 and consulted Mr. Browning in regard to the bill. Mr. Hurd did the writing of the bill. The paper called sub-exhibit "A I" is a list of stockholders of the subscribers of stock to the Mississippi Agricultural and Drainage Association. It was not an organization under that bill, but an independent organization for the purpose of raising the necessary funds to carry out the provisions of the bill; organized after the bill was passed, but was not the organization that went on afterwards and constructed the levee. It expired and went out of existence. It had accomplished its office when it furnished the means

necessary to do the preliminary work. Its purpose was simply to organize provisionally and set the commissioners under the new act in action. Mr. Rouse collected and handed me $20. The following persons subscribed the following amounts on the memorandum which I now have:——Ferguson $2, Robert Rouse $5, M. M. Alread $5, Dennis Green $10, John Aaron $10, J. Coffin $10, F. Wheeler $5, Mr. Williams $50, Evan Heffner $5, —— Wilson $10, H. Orr $5, R. Rankin $5, —— Boker $2, D. Bradshaw $1, John Range $2.50. This was for my personal expenses while in Springfield. I never knew of any public meetings with reference to the matter up to the time the bill was passed. After the bill was passed I obtained a copy of it. I called the public meetings subsequently held, and caused the hand bills to be posted. The first meeting was at Spencer's barn near Payson. No survey or profile had been made in connection; but a survey, or pretended survey, had been made by Mr. Leonard years before and some work done, and I got a copy of that survey. The survey finally made had no
10*a* relation to Leonard's survey. I was accompanied to the first meeting by Noah Rouse, who lived on the Sny bottom, below Hannibal. My impression is that there was less than a dozen persons at that meeting. Not more than a dozen. I addressed the meeting. I had with me at that time a copy of that bill which had passed in regard to the matter and read it and explained it section by section. Both before and after the meeting I conversed with parties who composed the meeting. I endeavored to explain to them the benefits that would arise to them by the reclamation of these lands and maintenance of the levee; that it would be a protection to these lands and render them safe for agricultural purposes and homes for themselves and families. I argued that the lands would be increased many times in value—double in value if it could be done, and if it could be done under the provisions of that bill it would require little or no money in doing it, because there was an abundance of time to reclaim the land and raise the necessary funds to build the levee.

The maintenance of the levee was in connection with the construction at all times, and the greatest stress was laid upon the maintenance, from the fact that the building of the levee amounted to nothing unless it produced the results. That fact was most thoroughly discussed. The object of that bill was to construct and maintain the levee for all time to come, after it was constructed to make our homes safe. The maintenance of the levee, or means of maintaining it, was provided for in the bill and, so far as I was personally concerned, was an indispensable inducement to lead me into the measure at all or to have anything to do with it; the levee

mony of Clark.

would be utterly worthless, as I stated before, unless susceptible under some law of maintenance; the construction of the levee
11*a* would be a waste of time and money. The same inducement which rested on my mind, to which I have just referred, operated in the same way on all the others who participated in the organization, judging from all that was said and done at those meetings and from the conversations had with persons composing them. The next meeting was at Kinderhook and the same thing transpired as at Payson. Then followed the meetings at New Canton, Rockport and Pleasant Hill—five in all. It was a matter most thoroughly discussed, namely, not merely the construction but the perpetual existence and maintenance of the levee under the act. At these various meetings the same character of discussions occurred. By some of the land owners it was claimed that the maintenance would be a perpetual tax and it was explained to them that it would probably be a tax, but the bill provided for the maintenance of the levee. Some objected that craw-fish, etc., would work through it. The maintenance and protection of the levee was more thoroughly discussed than the construction. When the funds were exhausted the second assessment became necessary. The original (temporary) organization to which I referred passed out of existence, which was done for the purpose simply of raising the necessary funds.

Re-Direct Examination.

I explained to the people that the levee would be constructed by the issue of bonds bearing interest, by assessment upon the lands. I also explained to the people that the law provided the means for maintaining the levee afterwards by taxation or assessment. The law was perfectly clear that the bonds were to be issued. They all understood it. We held a large number of meetings in the course of the construction af the levee. We were holding a meeting about the day of the extract from the Hannibal Courier, August 10th, 1871; organized on the 15th of September, 1871.

We were circulating a petition for stock. There
12*a* was a meeting by the jury held at New Canton after the formation of the district. Various meetings were held by us subsequent to these I have been speaking of. A great many people attended the meetings of the jury at New Canton. Quite a large proportion of the land owners in the immediate vicinity and some from remote points. I made all of the publications that the law required. The first was a notice that a petition would be filed on a certain day asking for the appointment of commissioners. I

posted these notices in all of the townships; it was done three or four different times, I think. So often that my horse got so that he knew the places almost. I obtained, with the assistance of Mr. Chamberlain, the names to that petition signed by John Morris and others. Testimon C. N. C

DANIEL J. MURPHY, being called for complainants, examined by Senator Palmer, testified: Testimon Daniel J. M

I now live in Jerseyville; am county clerk of Jersey county. I was familiar with the Sny levee, my knowledge beginning in 1872; then lived at Pittsfield. In the fall of 1872 I went on the levee as engineer after leaving school. I went in as back chainman in the location part in August, starting at the upper end in Adams county after a preliminary survey. I occupied that position during the location down to Scott's Landing, in Pike county. We then went back on the construction, and I was located on the part that was known as thecut-off, under Van Zandt, who was the civil engineer. Van Zandt and myself constituted the construction party of the engineering corps. The cut-off is ten or twelve miles below. We worked from there in both ways. I worked as far up as Hannibal. In fact it was nearly all done at that time as far as Hannibal except some finishing work. I think it was all done north of the railroad. Just what time that was I can't tell. I myself worked from about Hannibal to below Clarksville on construction about40 miles. There were construction parties at work at various points along the levee that would perhaps employ from 25 to 100 men, with their teams; 13*a* about 25 or 30 teams. There were shanties such as are built along such work, boarded up and down, sometimes built of logs, and sometimes dwelt in tents, and stores for purposes of supply, and blacksmith shops to accommodate the contractors. The people along the bottoms saw what was going on; there were not many people living right along there, it being nearly opened up along there. I think there were some supplies bought from the inhabitants. I began work in August, 1872, and ceased the 20th of January, 1875. At that time there was some grading work to be done at the lower end, perhaps the last four or five miles. E. L. Corthell was the engineer-in-chief. H. W. Parkhurst was the subengineer. I think he is now in Chicago. Mr. Van Zandt was engineer under him, second assistant, and M. I. Scott, in April, 1873, was first assistant engineer. Besides him there was Mr. Colton, who worked at the upper end, and Mr. E. G. Shields, of Hannibal. I think he is now in New Mexico, and there was a Mr. Draper.

Testimony of J. Murphy. Mr. Colton was an eastern man and I think he returned. Mr. Draper is now the head engineer of the C. & A. railroad.

I didn't attend any of the meetings held by the citizens.

Cross-Examination by H. S. Greene.

I started at the upper end of the levee, the north end, with the location of the levee line, and we run down about the first 28 miles of it near the river bank. We worked the length of the line during the period to January, 1875. The work commenced at various points at the same time. They would sometimes be two or three miles apart, owing to the contracts that were let; it was nearly all let to sub-contractors. Some would take a mile, some would take perhaps a station or so. One hundred feet was known as a station. The sub-contractors went to work with their
14*a* own men at these intervals and worked together until the connection was made between the embankments. There were some farms in the levee district about Hannibal; I recollect a Mr. Edwards and Mr. Rouse had farms. In the whole length of the levee, fifty-two miles, I call to mind about a dozen or fifteen farm houses. There might have been more than that. The Sny passed through the country between the river and the east side of the district. Next to the bluffs it was pretty well settled, on the east side of the bottom. This was from two to five or six miles from the work. I refer to the land where the land was higher than it was in the Sny bottom. I was never over a half-mile out in the bottom; I didn't traverse the bottoms much. Occasionally there were roads out, for instance from Cincinnati Landing to New Canton there was a road constructed across the Sny. There was a road across to Rockport from Louisiana. As the work progressed shanties were run up and may have been put somewhere else as the work was done. We went on between two and three years.

Testimony of J. G. Wheelock. JOHN G. WHEELOCK, being called for complainants, examined by Senator Palmer, testified:

I am one of the defendants and one of the original levee commissioners. My first connection with the Sny levee improvement was when I was appointed commissioner by Judge Atkinson, county judge. I then owned four or five hundred acres of land in townships 4 south, 7 west and 4 south and 8 west in the Sny bottom. Don't think I signed the petition for the appointment of commissioners. I had nothing to do with the passing of the law of 1871,

but heard of it. Knew Mr. Clark was engaged in attempting to secure the passage of an act. Don't recollect much about it until I was appointed a commissioner and met at Pittsfield with George W. Jones and William Dustin, the other commissioners. The commissioners and Mr. Clark rode on horseback down the whole line
15*a* where the levee was proposed to be built, commencing in Adams county. Mr. Corthell, the engineer, might have been with us. We went down to Clarksville, where the Shy empties into the Mississippi river; don't think we got to Hamburg Bay. We returned by way of the Bluff road. We examined the route as we rode along on horseback. The trip occupied maybe a couple of days. There was a petition after we were appointed by the court. I think we made a written report to the court. The next thing I think we let the contract on sealed bids. Opened the bids at Pittsfield; there were several bidders. Skelsey, Fuller & Pierce took the whole contract. Don't think any of the parties who lived on the land were bidders; don't recollect whether any of them were there; but think some were; can't give the names of any who were present; don't think there were a great many. I think there were some public meetings before our trip, but don't think I attended them. I lived in Adams county at that time. I was not at the meeting at Spencer's barn. I lived three or four miles from him. I suppose I had some conversation with Mr. Clark with reference to the law about building the levee; he was very active in the matter. I remember letting the contract. The most of the superintendence given to the execution of the contract was by Mr. Corthell, the engineer; we depended on him. We came over every month or so I guess. I can't tell with any certainty when the first bonds were issued; it was done on the estimate of the engineer on the work done. The contractors took the bonds. We delivered the bonds to the contractors; they were to take the bonds. That was the contract; they were to take the bonds at 90 cents on the dollar to pay for the work done, on the monthly estimates of the engineers. The bonds were issued from month to month as the estimates came in. We issued them direct to the principal contractors. I can't tell the amount of the first issue,
16*a* it was whatever was due when they got them. Don't remember the total amount of bonds issued. The bonds were disposed of only to the contractors. I think no portion of them were used for any other purpose—that is, so far as I know. Mr. Jones was secretary of the board of commissioners, and Captain Westlake, after the death of Mr. Dustin, was chairman, and lived here close to Pittsfield. What they did I can't tell you. Captain Westlake was appointed commissioner after the death of Mr. Dustin. I live thirty miles away from Pittsfield. There was a second issue of

ny of Wheelock. bonds, there not being enough of the first issue. They were disposed of in the same way. All the bonds, so far as I know, were issued to the contractors for work done.

We didn't go over all the line of work at one time, but we went over it occasionally. Think the work was commenced in 1872, and think it was finished in 1875. The work was done in sections by sub-contractors. The men at work often stopped in the winter time. Shanties and tents were erected for the laborers; the men were scattered along, some grubbing and some scraping and plowing. I didn't obtain the right of way. Everybody seemed willing. I think there was no objection to the construction, unless it was the first man at the start, I think we paid him something, a man by the name of Edwards. We didn't have any one to superintend the work after it was finished only to see that it was kept in repair. We had no engineer; after this suit was commenced we run out of money to do anything with, and didn't give it any attention after it was done. It broke and the landowners would get together and fix it up. The individuals made up about a thousand dollars; there was no bond money, that was gone; it just came out of our own pockets, and the landowners hired men to stop it and save it. I have 17 *a* no list of those who contributed to repairing the levee at that time. Henry Morris and Mr. Rouse and I, Mr. Jones and Mr. Westlake gave $100. One thousand dollars was raised. We all got there and fixed it up. We had lumber and wheelbarrows and I bought 80 shovels, but they never turned up afterwards. This was in 1876 or 1875. We weren't commissioners then. The money was given us by individuals. Mr. Jones took a part of the work and Mr. Westlake. Mr. Henry, a gentleman from Hannibal, and his father helped right along, and Mr. Stillwell all came right up and helped. That was not done with levee money. It broke several times. There was no other appointment besides the one I spoke of (as commissioners appointed by the County Court), to take charge of it. I recollect being appointed trustee under some trust deed, I suppose there was son e money placed in our hands, that is, in Mr. Jones' and Westlake's—there was none in mine. I heard about it. I recollect that there were lands conveyed to us as trustees. I think under that arrangement we took charge of the levee, and it continued perhaps a year or two. Money was raised under this deed of trust and placed in our hands for fixing up the breaks. I didn't have any charge of the levee under this present organization at any time. I was connected with Jones and Westlake. Have nothing to do with it now. I was never commissioner or trustee under the existing levee district. Don't think I was a commissioner up to the time of the formation of this new district.

Q. When did you cease to have management of the work?
A. When we heard and found out the thing was void and all wrong and the thing was gone; we didn't have any money after that, except for more bonds, and we could not get it, and there
18*a* was a decision that the thing was all wrong, then we went into this deed of trust, is my recollection.

Don't think I made a deed, because I was one of the persons to whom the deed was made; we acted under the deed of trust a couple of years, perhaps; money was paid to the trustees to keep the levee in repair. I remember that I was appointed under a decree of the Circuit Court of the United States to hold possession of the property. "There was that kind of talk, but it was never accepted; whether you can appoint a man to go against his will or not." It was not acted upon; I never accepted; never qualified; never declined. Think the deeds of trust were taken when the Shaw and Rupert case came up; were commissioners there. I didn't know of any association in 1870 for repairing the levee, etc. No persons obtained control of the levee from us. I was a party to the Shaw and Rupert case. The decree in the Shaw and Rupert case ordered us to open the head of the Sny, but we didn't do it; we went up there to do it and looked it over and the land-owners would not consent to it. I suppose I acted as one of the commissioners in charge of the levee at the time—couldn't tell the time; it was after the decree; it must have been in 1877 (it was 1874 or '75); Shaw and Rupert told us to hold on and not to open it and we didn't open it.

Complainants offer in evidence deeds of trust to Jones, Wheelock and Westlake, Commissioners, recorded in Vol 74 of Mortgages, at page 519; and another recorded at page 359 of same volume, one dated March 15, 1877, recorded on pages 359 to 366, another recorded on page 342.

I can't tell how much money we received under these deeds of trust but must have received some. Mr. Jones was secretary, and he kept those things. Couldn't tell when we released that interest; can't tell how we released, perhaps by reconveyance.

Couldn't tell whether we paid the interest on the bonds or not.
19*a* I paid my levee tax. Think I have paid my assessments for the lands all the way through.

Testimony of H. G. Wheelock.

Cross-Examination by H. S. Greene.

I never attended to any of the Sny levee business until I was appointed commissioner; then rode on horseback over the line of the levee and made a report to the court. Skelsey, Fuller & Pierce took the contract for the whole work. I went out sometimes and saw the work. None of the commissioners were engineers, and we depended on Mr. Corthell. I think the work ceased in the spring of 1875, when the funds were exhausted. Nothing was afterwards collected by assessment under the original act of the Legislature while we were commissioners. I heard of the suit pending in the Supreme Court of this State involving the validity of the bonds issued by the Sny levee district, and I heard of the result of it, which was that the bonds were held to be invalid and the assessment could not be enforced. From that time on under the law of 1871 the commissioners were never able to collect anything as commissioners in aid of the levee. It was not very long afterwards that the levee broke and needed repairs. The commissioners had no means to make repairs. I think the work ceased in 1875 and the levee broke in May, 1876. At the time the trust deeds were entered into we had to have some money, the levee needed repairing. There were several trust deeds made to us as trustees. If we acted in any capacity after the funds played out we didn't act as commissioners, but as trustees. I heard of the order of the United States Circuit Court in which the commissioners were required to hold the levee as receivers of the court. None of the commissioners acted under that appointment, paid no attention to it. I did very little about the trust deeds, but suppose a large sum of money was expended; recollect little about it, and had little to do with it. The purposes of that work (levee or-
20*a* ganization) was talked over by me no more than by any other person. When I would meet Mr. Clark he would explain it, as he said here to-day. It was the understanding that they were going to maintain the levee by taxation; that the law gave the means of properly maintaining the levy, by the same means resorted to in the first instance. I acted on the assurance given by the law in taking the part I did in prosecuting the work to a conclusion. I guess I was worse fooled than anybody. I thought when they built the levee it would stay there, we would all have good houses and a good settlement and all that.

Skelsey, Fuller & Pierce, the contractors, got the two issues of bonds. Mr. Francis Palms never bought any bonds from the commissioners, and nobody else got them except the contractors. We issued them right to the contractors at 90 cents on the dollar.

I don't know how any of these complainants got hold of their bonds, they didn't get them from the commissioners. It was a part of my knowledge that under that contract the bonds were to be issued to the contractors. I don't think the contractors went on and completed the work; never claimed to have fulfilled it; abandoned it. Their bondsmen went on and continued the work in their name up to the point where it was stopped. This is in the name of the original contractors. After the bondsmen or sureties of the contractors had commenced to prosecute the work the bonds were still issued to the contractors. They took them issued to Skelsey, Fuller & Pierce, to whom they were still issued. The contract was never changed to amount to anything.

I have never acted as commissioner since the formation of the present district. The trust deeds were considered by the men who had made these deeds as a kind of blot on their title and they wanted it taken off. We released them. It was done at the request of those giving the deeds of trust, they wanted them off.

21 *a* From the formation of the present district I have done nothing of late years as commissioner or trustee under the deeds of trust, except to release the instruments. I have done nothing since the second assessment was expended and the work stopped, except to defend in the Shaw and Rupert case.

Re-direct Examination by Gov. Palmer.

Money was obtained on the bonds for the construction of the levee alone. I suppose we accepted the levee as completed. The bonds were made payable to bearer and we delivered them to the contractors. I think Mr. Mansfield finished the work and we delivered the bonds to him and to different ones. Can't remember when we released the trust deeds.

Re-cross Examination.

I don't know anything about what the contractors did with the bonds. The levee was accepted; the money gave out, that was the acceptance of it. It was accepted for the reason we had no more money to prosecute it.

Re-direct Examination.

We paid them the best we could with what we had; we tried to get more, but couldn't get it. I suppose the levee was built according to specifications.

Testimony of E. J. Chamberlain.

E. J. CHAMBERLAIN, being called for complainants by Gov. Palmer, testified:

I am an engineer; employed by the commissioners; commenced in the fall of 1884. Know nothing prior to 1884, except as hearsay, about the levee. Mr. I. A. Claire was employed by the commissioners. I suppose as engineer prior to my employment. I mean the commissioners under the present organization. When I went to work the commissioners had control of it under the
22 *a* organization familiarly known as the organization of 1880, the Sny Island Levee Drainage District, which is the present district.

Complainants offer copy of the petition filed January 6, 1880, for the organization of the Sny Island Levee Drainage District. Admitted subject to the same stipulation as to objections heretofore entered, marked "sub-exhibit A. 2." Since 1884 I have acted as engineer in charge of the work and repairing, each year raising and strengthening the weak points when known, and following a general system of strengthening. During that time no one has exercised any active control over levee except those representing this district. The means to keep it in repair came from assessments made upon the lands. I don't know any of the boundaries of the old district under the act of 1871. In a general way I know the boundaries of the present district—portions of it. Don't know whether the boundaries are the same. Since 1884 I have been engineer of the levee district and had possession of the levee its whole length, and exercised control over it during that time, and have been paid for my services by the district. In that time have spent something over a hundred thousand dollars. In the past year nearly $52,000. I have had exclusive control of it under their directions and has never been interfered with. Three railroad companies occupy a portion of it, or we occupy a portion of the railroad embankment, I don't know which to term it—that I have never attempted to control. I don't know which was built first, the levee or the railroads. They are the Wabash railroad company, a branch of the C., B. & Q. and the C. & A. I have nothing to do with this portion occupied or used by them. They run along the top of the embankment which holds the water out over near the Hannibal bridge this way for half a mile or more, then from
23 *a* the Louisiana railroad bridge crossing at Louisiana for a mile and a half or two miles, for the two roads. They are used to make a continuous embankment at all times.

Cross-Examination by H. S. Greene.

Testimony E. J. Chamberlain.

All of these railroads occupy between one and three miles of what is called the levee. I don't know whether the railroad uses the levee or the levee uses the railroad.

A. G. CHAMBERLAIN, testified:

Testimony A. G. Chamberlain.

I am one of the oldest settlers in this part of the country and an old surveyor. My understanding is that the Wabash built the embankment that they are using. I think the Wabash built the embankment, but we were permitted to join on them at one place, making the railroad for a half or three-quarters of a mile a part of the Sny Levee. I first became acquainted with the Sny district in 1847. Think it was in 1871 when my attention was called to the existing levee scheme by Mr. Clark. At that time I think there was a levee law we could act under. He requested me to go with him to the landowners and try to raise means to organize under this levee law. I went with Mr. Clark at his solicitation. I knew the citizens and went with Mr. Clark as a guide to the people. I took him to the different places up and down. We went to nearly all the citizens in Pike county that owned land that we could get to see. Couldn't state the proportion of the whole number. I think the paper presented is the subscription paper we took. My memory is rather treacherous in regard to what I did myself. I rather dropped out of it when Mr. Clark and I quit going together, except that I attended some levee meetings when the levee broke and helped to repair it; we provided means. I had nothing to do with the proceedings in court. I have contributed several times to the work. I don't remember in what year we made those trips. Mr. Spencer was a contributor I think, and Mr. Dewitt Greene, of 24*a* Barry. Mr. Streffins and Mr. McTucker paid. We held meetings and different ones paid. I saw the levee where they were at work; never passed down the full length of it. I visited the northern portion during the time it was under construction. There were a great many teams there at work, plowing, scraping and clearing timber; had shanties and stables for their horses, and teams would go to the uplands for feed. Think it continued for about three seasons. I have been along it several times up and down below Cincinnati, which is opposite New Canton, Illinois. It is simply a steamboat landing. Some 30 miles below the north end of the district. Saw them at work there the same as before with shanties, men, etc. As long as I owned land I paid assessments. Know of some few others who paid. I think the levee was constructed before the C., & A. and the C. B. & Q. railroad.

Testimony of S. M. Spencer.

S. M. SPENCER, examined by Gen'l Palmer, testified as follows:

I have owned land in the Sny bottoms since 1855. I once had an interest in 3,000 acres, not so much now. I raised most of 22,000 bushels of wheat on this land this year—a little of it on the bluffs.

I have been fighting to help it along since I started in; that meeting at my barn was the beginning, and it kept extending on. At the time of that meeting at my barn Mr. Clark and Mr. Rouse had been informing us on the subject and stirring us up. We heard about Mr. Clark going to Springfield to get a law passed to organize for reclaiming the lands.

I don't think I helped any; I was holding back about that time; I told them it was a lifetime fight if we did start, and I didn't want to start. Don't know the time of the meeting at my barn; it was in hot weather. This subscription paper was then started and we subscribed to it. I signed the petition for the appointment of commissioners. Mr. Clark kept stirring towards getting the work along, and I attended some of the meetings.

The next meeting that I remember of was after they had 25 *a* been over the route at New Canton to nominate commissioners; they had to be appointed by the judge.

I attended a meeting at Brewster below Canton; forget what was done there, or who was present except Mr. Clark. The work was carried on with many difficulties—the contractors had difficulty in paying their men and paying for supplies. Merchants, butchers and farmers furnished supplies for the contractors for which they were not paid.

I suppose that everybody on the bottom ought to have known that this work was going on; don't see any reason why they should not. I didn't go over the levee much below my place, which is five or six miles below Hannibal. I went over the levee with the commissioners under the new organization in the spring, 1880.

I suppose that was about the time that organization took possession of the levee and commenced keeping it in repair. I knew there was a change in commissioners, and they seemed to start out under a new plan of work, and expected to get a regular tax they

could depend on for raising the money needed. That organization has continued since. The commissioners at that time were Mr. Murray, Stebbins and Barnard. There was a change of commissioners in 1883 or 1884. Testimony S. M. Sp

Mr. Claire was engineer in charge of the work, and continued until his death, in the fall of 1884, when Mr. Chamberlain took charge. I paid assessments, about $2,000, interest on levee bonds in 1875, and some others paid in our neighborhood; I think 26*a* most of the landowners in the district in Adams county paid.

I then lived in Adams; left there in the spring of 1880.

I signed the trust deed and paid an assessment of fifty cents an acre for two years. I paid mine in work on the levee, and most of it was paid that way. The commissioners put the work in my charge from the cut-off up for seventeen or eighteen miles in 1876. I also worked under them in 1877 and 1878. They didn't do much in 1879, we thought the levee was good enough then till it broke in 1880.

It was before the levee broke in 1880 that I went over the line of the levee with the new commissioners, when they first commenced to take an active part in looking after the business. The engineer went with them.

Cross-Examination by H. S. Greene.

I commenced work about the 20th of October, 1876, in repairing a break near the upper end of the levee, which was the first work I ever did.

The deed of trust was talked over some time; it was to contain 30,000 acres before it was binding on any one. During that winter they anticipated those trust deeds would come in all right, and we commenced to work. They had no means under the old assessments. Whatever means they realized came from another source.

There was no other persons that had the right to give permission to work; they told me they wanted me to go down and work to the cut-off and do the best I could, according to my judgment, and I would have to depend on getting help the best way I could in raising money. I was interested in preserving the

mony of Spencer.

levee on my own account. I didn't have any authority to look
27 *a* to the commissioners; I had authority to go on and do the work, and they gave me blank receipts to fill out to individuals that would furnish money or teams. Whenever I could get any help I gave a receipt under the deed of trust; the deed of trust was mentioned; referred to the deed of trust for pay for work to be done; didn't look to the commissioners for any pay at all; didn't receive any money.

I heard of the decision of the Supreme Court of this state that the bonds under the law of 1871 were void and assessments could not be enforced under it. I didn't pay any interest after 1875, nor hear of anyone else who had paid. A good many paid in 1875. When I paid my assessments my understanding was that was to pay the interest on the original levee bonds for the construction of the levee.

I was aiming to act in good faith in the matter and keep the interest paid up. I didn't suppose the bonds would be paid for ten years, and what was collected I supposed was to pay interest.

mony of sigsworth.

JOHN SIGSWORTH, examined by Gov. Palmer, testified for complainants as follows:

It is admitted that witness was one of the jury that made the original assessment.

We made a report of assessment or damages. We went down the levee and up on the other side, and after that met at New Canton, where the damages were assessed before a justice of the peace.

Our report shows the result; we signed a report; we took an oath. (All this testimony objected to by the defendants as not being relevant and not binding on any of defendants.)

Cross-Examination by H. S. Greene.

28 *a* The jury did not go over all the lands in the district; we went down the levee line from the head to the foot, near the river, and touched the line of the high water mark when we came along on the east side returning.

In returning we did not go clear up to the upper end. We went down on one side of the Sny and came back on the other,

was the extent of our examination of those lands. I knew every foot of the bottom. The distance between our track going down and returning would be from three to six miles. A part of the time returning we followed the Bluff road; sometimes Mr. Corthell would show us where the high water mark was. What he told us was all we knew about how far the lands were under water, and he had a map for us to look at. Testimony of John Sigwar

The map didn't show whether the land was high or low. I don't know where the high water line was myself, though I had herded cattle on the bottom for five or six years. What he said and the maps and my acquaintance with the bottom all seemed to correspond very well. We went over the land some between the bluffs and the river bank, we occasionally came out beyond the high water mark, which could be seen by the trees and things, and down onto the lands in the district. We did not attempt to go on all of those lands. I was acquainted with the bottom, knew every particle of it, and assessed the lands according to the best of our knowledge.

Stipulation: It is hereby stipulated between the parties who are now represented by counsel that any clerical errors or accidental mistakes in any instrument which is a mere copy of another instrument or of a record, and in which a mistake shall be discovered, shall be subject to proper correction on both sides. Stipulation.

C. N. CLARK recalled for complainants.

Testimony of C. N. Clark —Recalled.

29*a* The railroads connected with the levee were all constructed prior to the building of the levee. We tied onto the Wabash railroad at Hannibal and ran up it about 1¼ miles; near Louisiana we struck what is now a leased line of the C., B. & Q. railroad. We joined onto and used that road as an embankment for about a mile to the bridge, then using the embankment of the C. & A. railroad some ¾ miles. The roads were built prior to the building of the levee. These are the portions of railroad referred to by Mr. Chamberlain; they don't belong to the levee district at all, they have no right there, only the right of priority (possession).

Testimony of G. H. Whittacre.

G. H. WHITTACRE, examined by Gov. Palmer, testified for complainants as follows:

The old and the new levee district are nearly of the same size. We took Mr. Corthell's map on the second jury and the old tax list books and copied the names off that on the assessment for the present Sny levee district.

Cross-Examination by Mr. Greene.

The present district was defined by Mr. Corthell's map and from Mr. Corthell's high water line.

It is agreed that Mr. Whittacre may make a written statement and put it among the files.

While the lines of the two districts are nearly identical they are not accurately so. In the southern parts of the district some are left out.

The area embraced in the present district is less than in the old; there were also some few tracts thrown out of the upper portion, land retained above high water.

Testimony of G. W. Jones.

On August 25th, 1891, at Springfield, Illinois, George W. Jones being called for complainants, examined by Gov. Palmer, testified as follows:

30 *a*

I formerly lived in Pike county; have been acquainted with the Sny bottom all my life, more or less; not so familiar with it in early years as of late. I first became familiar with the levee district about 1872 when I was appointed levee commissioner by the County Court. The district is about fifty miles long, and about three to five miles wide. About twelve miles below Quincy an arm of river leaves it and goes down through about the center of what is called the Sny levee district and empties into the river again near Clarksville; and prior to the construction of the levee the water in ordinary high water would run from the river through this Sny Carty and out to the river again. There were two cut-offs or openings through which the water ran out from the Sny into the river not annual, but when there was very high water in the Mississippi river it went over the bottom. I had nothing to do with the preliminary organization of the district until I was appointed commissioner. I

had been clerk of the Circuit Court for four years and was at that time deputy circuit clerk. Lived in Pittsfield, which is twelve or fourteen miles from the nearest point in the levee district. I owned no land in the district at that time. I now own 160 acres, purchased in '74 or '75. I was interested with another party in another tract purchased about the same time. I was appointed commissioner in '72. My associates were John G. Wheelock and William Dustin. The former then lived in Adams county, but subsequently in Pike county, about 4 or 5 miles above Kinderhook. Mr. Dustin lived on the bottom about 2 miles below Athens. We organized by electing Mr. Dustin chairman or president, and I was elected sectary, and we then proceeded to make a survey. Testimony Geo. W. J.

Stipulation: It is stipulated that the same objections that were agreed upon in Pittsfield are carried in to this, and continued as long as this examination lasts. Stipulation 31*a*

We submitted a report of the survey to the County Court, estimating the probable cost of the embankment and the benefits that would accrue to the land by construction of the levee. It was approved by the court. I had very little personal connection with the examination of the land and the surveys. I think Mr. Wheelock and Mr. Dustin were with the surveying corps from time to time, and after the assessment was approved by the court Mr. Wheelock took the upper end of the district and Mr. Dustin the lower end. I did not go with them personally. I never went with a surveying party down the line of the levee. I was up and down the line frequently while the work was being constructed, but not with them in any of the preliminary work.

We executed some papers, but I could not undertake to describe them with accuracy; my colleagues concurred with me in executing papers. Do not know where the papers are now. We kept records of our proceedings, and files of the estimates that were made by the engineer and all reports made by him as the work progressed. I do not know where the books and papers are now. They were in Pittsfield in the office we occupied as levee commissioners. When I was elected clerk of the Appellate Court I gave the keys of the office and of the desk to Captain Westlake who lived near Pittsfield, and who had been appointed commissioner after the death of Mr. Dustin.

I had no occasion to examine them afterwards. After the decision of the Supreme Court holding the law under which we had been acting unconstitutional and our acts void we never assumed

ony of
. Jones.

to do anything as commissioners, and we had in our possession
32 *a* those books and papers. We kept a record book, a book giving the lands in the district or the Congressional numbers, and a book in which we made a registry of bonds; that was a bound book and as the bonds were issued I numbered them and put them in the book, which was kept by myself. It showed the number and amount of the bonds and to whom they were delivered.

We let the contract for building the levee to Skelsey, Fuller and Pierce. They were the contractors and entered into contract with the commissioners. They sub-let a great deal of the work and they did a considerable amount of work themselves. In the spring following (1873) the high water drove them out and they had to suspend work, and after the water went down in the summer we served notice upon them to resume work upon the levee and they failed to respond. We had required of them a bond for the commencement and completion of the work within a given time signed by parties in Detroit. I don't remember all the parties who signed that bond; there was Mr. Foxen and Moore, and I think Col. Atkinson. The bond was for $50,000, and they were fearful of suit being commenced on the bond, and entered into some arrangement with Skelsey, Fuller and Pierce, (as I understand it, I was not a party to any arrangement they made), by whicht he bondsmen took hold of the work. The proposition was repeatedly made to the commissioners to cancel the contract with Skelsey, Fuller and Pierce and enter into a new contract with other parties which we declined to do. The whole work was carried on under the contract with Skelsey, Fuller and Pierce. I do not know what became of those books and papers after they gave up the office. They were all there intact when I left them with Mr. Westlake, who was a commissioner. He died in 1882.

In the execution of the work we depended largely upon the
33 *a* reports of our engineer, Mr. E. L. Corthell. Surveys were made by him and under his direction by a corps of engineers he employed.

I was frequently on the work during its progress. It commenced in the fall, perhaps September of '72, and the work stopped in the winter of '74 and '75; during the progress of the work there was a large number of men and teams working at different points; it was sub-let in sections; when the river was high and the weather very hot work was suspended. The average height of the levee was about 78 feet and 10 inches.

Q. Was the levee in fact completed?

A. Well, yes, and no; there was a continuous line of levee work from the head of the levee to the point on Hamburg Bay, but it wasn't as complete as the original plans called for; a great deal of the work wasn't up to the proposed plan, and the contract provided for the cutting of a ditch from the point where the Sny emptied into the Mississippi river near Clarksville into the head of Hamburg Bay, and that ditch was never completed, never was made a ditch. There was an effort to make it but our money gave out and we hadn't the means to go on with it, and it was abandoned, with the expectation that it would finally cut itself out. The levee was about 52 miles long. I took no personal part in procuring the right of way. The engineer and Mr. Clark had much to do with it, I can't give any details in connection with the right of way. There was a levee built along the whole line. There were controversies about the right of way from time to time and they were compromised, and sometimes we ran over them. During the progress of the work we paid for it under the contract with Skelsey, Fuiler & Pierce with levee bonds at 34*a* ninety per cent of their face value; we had authority to issue about 6500 and we issued 6400, $600,000. There were two issues. The bonds were issued as we supposed by the authority of the law of '71, and of the court, and we issued these bonds from time to time upon estimates made by the engineer as the work progressed, and they were numbered consecutively, with coupons, and signed by the president of the board and by the secretary. I have from time to time identified the bonds before the master. I don't remember the amount of the first issue, but the amount was exhausted, and in order to carry on the work a second issue was made necessary, and authority was given us by the court to make the second issue, and we made the further issue. They were issued in the same manner as the first, to the contractors upon their contract. The second issue amounted to $148,500. The first issue may have been $499,500. I would say it was. I continued to act as commissioner until after the work was abandoned, and we issued the bonds to the contractors for their work done. We did absolutely nothing in connection with this work after the contractors stopped work; we hadn't anything to do with; paid out all the bonds we had, and soon after that the matter got into litigation and we waited to see the result. We didn't ourselves register the bonds before delivery; we delivered to them (the contractors) and they came to Springfield, is my understanding, and I know in some instances, for I came with them. We delivered them before registration. They had them registered and paid the fee afterwards. I don't re-

ony of
. Jones.

member that we made any report to the auditor. I know the auditor received the bonds and registered them, probably received them from the owners or parties who had them in possession, when they were brought here for that purpose. Up to the time of the decision of the Supreme Court we exercised the powers dele-
35 *a* gated to us under the law as commissioners, up to the time the Supreme Court decided the law under which we acted was unconstitutional; but not after that time. We didn't keep any engineer after the work was stopped; we hadn't anything to pay with. We didn't make any arrangements for the care of the levee. There were no high waters between the time this work was received from the parties until the decision of the Supreme Court. Citizens living in the vicinity of the levee might have looked after it to see that no harm was done it. I don't remember that we prepared and published any rules for the management of the levee. We had no regularly employed agents to look after it. I think that Mr. Clark and parties living in Hannibal, Louisiana and Clarksville who had an interest in the district gave it some supervision; but we were with our hands tied, had nothing to pay any one with, and consequently didn't make any contracts by which we might possibly become personally responsible. The suit to which I referred in which the law was held unconstitutional was that of Zephenia Webster et al.

I remember the suit that was instituted against us by Shaw and Rupert—against the commissioners. The file marks on the answer shows that it was in August, '75. The signatures to the answer are the names of the commissioners and are in my handwriting. I don't remember what is in the answer, but I believed it to be true at the time I filed it. Don't remember how long the controversy continued. Wasn't present at the taking of depositions in the case. The land owners settled that controversy. Judge Drummond made an order in the case ordering the commissioners to remove the obstruction from the head of Sny Carte, an embank-
ment that had been placed there to stop the water from run-
36 *a* ning through and which formed a part of the levee. We were to do that within a given time, and in default of our action the United States marshal was to remove it at our expense. The land owners then met at Hull's Station in the district and entered into some sort of an arrangement with Shaw and Rupert and paid them a certain sum of money. I don't know whether that order was ever set aside in the Circuit Court or not, but some arrangement was made so we didn't remove the obstruction at the head of the Sny Carte, it being a part of the levee system. The result of that suit was to order us to destroy the levee. I can't say what land

owners made the arrangements with Shaw and Rupert. It is my recollection that Mr. Clark, Mr. A. J. Stillwell, Mr. James S. Irwin, and perhaps Col. Matthews, of this place, were present when the arrangement was made. I believe the contract, if there ever was one, was entered into at Pittsfield. I took no part in it. I don't know whether the proceedings of the Hulls meeting were published or not. No considerable number of the aggregate of the land owners were present at that meeting. There were representative men from each portion of the district. Hull's Station is at the crossing of the Louisiana branch of the C., B. & Q. railroad with the Wabash. It is but a few miles east of Hulls to the east side of the district. I can't say whether Mr. Spencer and Mr. Chamberlain were present. I can't say whether the arrangement with Shaw and Rupert was reduced to writing or not; I don't remember of seeing any; don't think I ever saw the list of the persons who entered into the agreement. I can't recall who were present at the meeting at Pittsfield. I think the arrangement with Shaw and Rupert and the land owners was consummated, but have no personal knowledge of it. I don't think the land owners had any attorney in the matter. Don't remember whether Mr. 37*a* Matthews was there that day or not; couldn't say where the meeting was held. We depended on the order to help us through; don't think all of us had money enough to take that obstruction out of the head of the Sny without the assistance of the water.

I know there was a suit commenced in '78 against Wheelock, Jones and Westlake, commissioners, by Palms; I think we defended it. The papers are on file. I remember there was a decree rendered in that cause. By that decree we were required to hold the property for the benefit of the parties concerned. We never did anything definitely under that order; there was nothing for us to do especially, and we had no means to do with. The decree appointed Westlake, Wheelock and myself as receivers. We three were defendants in that suit. I think no others; we were familiar with the order made in that case. We never did anything definitely under that order; from time to time I talked with Judge Treat in regard to it as I would meet him. At the time they reorganized the district I went to Judge Treat and spoke to him and told him they had reorganized the district and had gone to work on levee and repairing the breaks, and I said to him the question with me was whether we, as receivers, should make a report to the court, and he said, if they are damaging the levee it is your duty to do it, and I said they were bettering it and improving it. He said he didn't know as any harm could come of

Testimony of Wm. W. Jones.

that, and I said if they try to take it across the river I will let you know. That is about all there was to it. I and my associates have not met under that order. Have had no formal meeting. We discussed the question as to what we were to do and what was expected of us, and concluded that all there was for us to do was to see that no one destroyed the levee or damaged it, having no means at our disposal we couldn't employ any one. We had
38 *a* no formal interviews with any of the landowners, but incidentally spoke of it as we would meet. The landowners would frequently confer with us in regard to it.

After the decision of the Supreme Court the levee broke and parties who had put a good deal of money in improvements held a meeting, I think at Hulls Station, with a view to getting up a deed of trust, but with a condition in that it should have no effect unless a certain amount of acres were pledged. An effort was made to get parties to go into this deed of trust and they did, I think, secure the land, but not nearly the number of acres they had agreed upon. They afterwards held another meeting and substantially the same deed of trust was agreed upon, but contained a less number of acres. Think that meeting was held at Hulls Station; don't remember of any meeting elsewhere. A considerabe number of the landowners were present on both of these occasions. These were the occasions of getting up those deeds of trust. The first contained probably sixty or seventy thousand acres of land; if that number went in then the deed of trust was to be placed on record and they were to go on and make assessments and repair those breaks; but they did not get the number of acres. Then they held another meeting and agreed upon a less number of acres, perhaps 25 or 30 thousand acres, the deed being substantially the same and they got enough to go into that deed of trust to amount to the number of acres agreed upon. Mr. Wheelock, Westlake and myself were named as trustees. The deed of trust was executed and placed on record. I think the deed of trust provided that not to exceed fifty cents an acre should be levied upon the land in the district for the purpose of raising funds to repair the work. There was no objection that I
39 *a* know of to any one coming and paying with us, and we levied an assessment upon the lands included in the deed of trust. We only had power to enforce it on the lands included in the deed of trust. My recollection is that the first assessment we made was 25 cents an acre. We made the assessment under the deed of trust and collected as far as we could. The papers and documents showing what we did are with the old Sny levee papers. I don't know whether there are any such papers or not. There were

such books and papers and a record kept. I kept the records. I acted as secretary of the board of trustees; don't know that there was any formal appointment of a secretary; my recollection is that there was not. It is not true that I continued to act as secretary of the commissioners; I never assumed to act as commissioner in any way directly or indirectly. I acted as secretary under those trust deeds. I don't remember as to any new appointment; I don't remember that there was a formal appointment. There were books connected with the affair, and papers. The mode of making assessment, as I remember, was we announced the amount of the assessment and when it became due. I think this was done by publication, and calling upon those parties who entered into the deed of trust to come forward and pay up, and I once or twice published in the papers that I would meet the landowners of the lands embraced in the deed of trust at Hulls Station and at New Canton and at Rockport, where they could come in and pay up. I published this notice of our intention to call. I don't recollect in what paper, but I presume in the Pike county papers and in the Hannibal papers. I attended at those points to collect assessments, and executed receipts for them. I signed these receipts alone. I don't think we gave any bonds. There were at the time records to furnish the facts; there should be a record showing 40*a* the amount collected by me of those assessments. There should be a record of it; there was very little money collected; a great many of them worked out their assessments on the levee. We permitted them to work out their assessments on the levee. The levee was broken in several places and in high water the district was overflowed, and all parties interested were anxious to rebuild the levee. All that some land owners had in the world was in that Sny levee district, and they hadn't any money, and the water being over the bottom they had no means of making it on that land. There were some of the land owners that did pay and some of them couldn't pay. I visited some of the breaks in the levee from time to time, but not frequently. I think possibly Mr. Wheelock gave it some attention; don't think Westlake ever did, not to any considerable extent. I remember of meeting Capt. Westlake on the levee. Whenever there was threatened break in the levee and there seemed to be immediate danger we always went to the levee. I remember of all three of us being at the levee when there was a threatened break above Hannibal, and also at the time it broke at the approach to the bridge and other places. I can't tell whether it was when we were acting as commissioners or after we ceased to act as commissioners and became trustees under the deed of trust; it has been a long time ago. I remember the fact that I participated and superintended the labor in restoring

timony of C. W. Jones.

the levee. I could not say whether it was while we were acting as commissioners or after we ceased to be commissioners and became trustees. The money collected was paid out to laborers for work done on the levee. I don't remember that we ever made any report; I was acting as trustee when I left there in '78, and the work had never been closed up under the deed of trust. We made assessments on the lands to a certain aggregate amount. This
41 *a* was distributed against the lands that had gone into the deeds of trust. Never furnished any account of that aggregate to anybody to my knowledge; don't know whether Westlake and Wheelock ever did or not. I would say all of this was of record up to the time I left. There are books that would have an account of all the moneys in my hands and my orders, assessments and all. I think a good deal of the work was done under the supervision of Mr. S. M. Spencer, and some under the supervision of Mr. C. N. Clark. There was considerable work done on the levee lower down, of which Phillip Donahoe kept the account. He lives at Rockport and had charge of some work down there, and he gave receipts when the work was done. There was never a full settlement of those accounts; they were left in quite an indefinite condition and shape. Under the deed of trust Mr. Spencer superintended one piece of work north of Hannibal, and probably strengthened the levee at the lower end between that and what is called the cut-off. The point at which he worked was probably two or three miles below the head of the Sny where the levee had broken, above Hannibal. I think he strengthened the levee below. I couldn't say as to who took the next part on the line of the levee. I don't know as there was any one definitely designated while we were at work under the deed of trust to look after the work or to look after the security of the levee. There was work done above Hannibal where Mr. Spencer was; there was some work done at the big cut-off; the cut-off is about 12 miles below Hannibal, and there was work done at what they call Big Muddy on the line of the road. That was four to six miles below the big cut-off. There was work done in the vicinity of Louisiana; don't think any considerable amount of work was done below Louisiana under the deed of trust. Parties at the lower end of the district had refused to put their lands in the deed of trust.
42 *a* They did nothing towards improving the levee that I know of.

I don't think there was any work done below Louisiana; there might have been. I should say there is 20 miles of the levee below Louisiana. Pike county lies opposite Louisiana. The line

between Calhoun and Pike counties is right at the mouth of the cut-off a little below Clarksville. It is about 12 miles from Louisiana to Clarksville. I don't know as to any break or threatened break near the cut-off. I don't remember of any break in the levee between Louisiana and the big cut-off except at Big Muddy as it is called, and possibly some sloughing off of the levee in the vicinity of Gilgal. It broke at Big Muddy and let the water through and relieved all the balance of the levee. Mr. Clark is more familiar with that than I could possibly be, and perhaps more so than any one. I ceased to act as trustee when I came over here. I never went back down on any business connected with it, except when I went over one time to execute a release of the deed of trust.

That was in February, but I don't remember the year. We executed the release at Hannibal. I went there because it was convenient; we met there for that purpose. I suppose they had it recorded, don't know. I know nothing of the formation of the Sny Island Levee Drainage District under the late law. I was not definitely informed that the parties expected to organize under that law. I know Col. Matthews proposed an amendment to the constitution which carried in the state; at the next session of the Legislature he introduced a bill to establish drainage districts under which they organized over there, but I don't know anything about it. I never formally surrendered the control of the levee to any other person. I can't say that we did as commis-
43 *a* sioners, trustees or receivers or any other way. Our consent was not obtained in any way to the possession of the levee being transferred to others. We simply ceased to act. Since I have ceased to act I have paid no attention to the control of the levee. We gave some sort of attention as to whether or not they were injuring the levee. I know about a certain franchise being on foot to some railroad company. I corresponded with Mr. Wheelock as to whether it was necessary to ask the instructions of the court in regard to that, and then parties interested told me that such arrangements had been made between the present levee commissioners and the railroad company, that those acting for Mr. Palms were satisfied, and we never did anything further. That was between the present levee district authorities. We were in no wise a party to that. All the attention we ever gave it was whether it was necessary for us as receivers of the United States Court to make any report that such proceedings were being had, for our own protection. Mr. Wheelock any myself met at Hannibal at the time of the execution of this release; I think Mr. Westlake

Testimony of W. Jones.

was dead. We didn't do any other business there as commissioners or trustees other than the mere releasing of the deeds of trust. I think that was in '87. I heard of the formation of the levee district under Col. Matthews' law. I was not consulted as to its formation. I never consented to its formation in any way, except it might be that I paid my assessment, but that other organization had nothing to do with it. I have not at any time disclaimed to the court or otherwise the trusteeship or commissionership of the United States Court, I wanted to get out of it. I didn't know what responsibilities might attach to it. I was never relieved in any, don't know of any steps having been taken; have no knowledge of any.

44 *a* Don't remember whether I testified in the Rupert case or not.

I don't know that I ever did.

I identified before the master the bonds in issue in this case. I could not identify the list, but the bonds that were presented to me were genuine, and my testimony was taken before John A. Jones, master in chancery.

Mr. Greene: I have no doubt they are genuine. The master's report is filed in this case as being the paper referred to by Mr. Jones.

Mr. Palmer presents list of bonds issued.

I think that a list of the lands lying in Adams and Calhoun counties was obtained from the clerk of the Pike County Court and filed in the County Court of those counties.

Cross-Examination, conducted by Judge H. S. Greene.

Previous to my appointment as a commissioner I took no action with reference to the levee district. After our appointment we caused a survey to be made and reported it to the County Court, where it was approved. A jury was empanneled and assessed the benefits. I did not accompany the jury in making its assessments. We advertised for the contract and the firm of Skelsey, Fuller & Pierce took the entire contract. There were plans, specifications and profiles showing the amount of the work.

They sub-let a part of it. Work commenced in September, '72, and the original contractors prosecuted the work until they suspended probably in April, '73. They worked almost continuously through the winter. The work done when they suspended was probably equivalent to five miles of levee. At the time the first issue of bonds had not been expended. The sureties on the contractor's bonds was strangers to me; remember the names of Mr. Heffron, Ferguson and Atkinson, but cannot remember all of
45 *a* them. After the failure of Skelsey, Fuller & Pierce every effort was made by the bondsmen to have the commissioners cancel the contract between them and Skelsey, Fuller & Pierce, and to that end wrote and telegraphed us repeatedly. We told them the work must be continued and completed under the Skelsey, Fuller & Pierce contract or we would bring suit upon the bond. I went to Detroit with our attorney, Mr. Grimshaw, and had personal interviews with some of the bondsmen. I think Mr. Heffron, one of the bondsmen, came to Illinois twice; his representative was there and one Foxen was there; but not the one on the bond. I do not know what proportion of bonds had been issued up to the time when Skelsey, Fuller & Pierce suspended; they were issued upon estimates of work done, furnished by the engineer and the bonds were paid over to Skelsey, Fuller & Pierce; Pierce took the bonds and went to Chicago to negotiate them; don't know what he did with them.

Testimony Geo. W.

After the failure the bonds were still issued as in the first place to Skelsey, Fuller & Pierce and receipted for by them by Foxen or Mansfield. If in my testimony before the masteer while identifying the bonds it appears that I said that the bonds had been issued to raise money with which to prosecute the levee, I should have said and do say that the bonds were issued and paid to them (the contractors), in pursuance of the contract, and the commissioners never sold a bond, never paid them a dollar in money. I mean to say and I have said, because it is true, that we paid the contractors the bonds for work done under the contract, at 90 per cent. of par value, and never paid the contractors directly or indirectly one dollar in money. We did not as commissioners sell anybody any bonds for cash. We issued to Mr. Corthell, chief engineer, on his estimates of the expenses of his corps,
46 *a* bonds sufficient to pay the expenses and the engineering corps, and he took them and disposed of them. No part of this was for the contractors' services. The contractors took the bonds at 90 cents on the dollar, as to both issue of bonds.

In some instances we procured the right of way from the

Testimony of W. W. Jones.

land owners; in some instances we agreed by compromise it should be applied to assessments or something of that sort. The work was being prosecuted over a very unsettled portion of the Mississippi bottom and there were large tracts without title whose owners we did not know and unoccupied. We built the levee through the 16th section in township 7-5, the title to which was then owned by the state for school purposes. No objection was made by the owners not present there because they did not know what was going on, or did not see proper to appear, and we just ran over the land and went on. I think the bonds were registered under the supplementary act of the next session of '71 and '72. I remember the Webster case which was carried to the Supreme Court of this state. By the time that case was decided both issues of bonds had been expended.

From the time that decision was handed down by the Supreme Court we never assumed any powers as commissioners, we felt the same interest as other owners of land in the district, the same anxiety in regard to it, but we never performed an act; we had nothing to perform with; had no means and no disposition to do it; regarded the decision of the Supreme Court as being the final decision of a court of last resort in the state, and we were no longer commissioners and never assumed to act as such. Subsequently certain trust deeds were prepared, four of them I think, all being identical in substance except as to the signatures and the lands described.

47 *a* I think there were about 110,000 acres of land embraced in the original Sny district. There was a larger amount of land in the district, but the lower end would be affected by back-water, and would be only partially redeemed from overflow, the lower end of the levee district being open. Perhaps 101,000 acres was redeemed from overflow, and several thousand acres more partially redeemed. Quite a large number of land owners in the lower end of the district always insisted that their condition was worse than before the levee was constructed, they insisting that an increased quantity of water was thrown back on them, water coming down the creeks and Sny and being held there by the back-water and levee. Before the levee was built there were a number of outlets by which the water flowed from the Sny into the river.

The average height of the levee was 7 feet 10 inches, as I remember it. It was run at that average height down to about 30 miles, I think, when Mr. Corthell found that height would run it

above the high water mark of 1851, and from that point down it was not so high; it was not a perfect levee; we hadn't the means with which to build it, complete it. Down to Gilgal brought to height of specification. I should say from that point it was never brought to the height required by the plans and specifications. The plans required a slope of three to one on the outside and two to one on the inside; I could not say whether that slope was maintained. The ditch required by the original plans and specifications was not constructed according to those plans to carry the water from the Sny down to Hamburg Bay. The mouth of the Sny was entirely closed up, and the plan was to dig this canal and carry the water on down to Kings Lake and beyond that into the head of Hamburg Bay. Perhaps 3 or 4 miles. I cannot give the dimensions of the proposed ditch, only that it was not constructed in accordance with the original plan. They cut a ditch through 48 *a* and we run out of means and could not complete it and they quit. The water ran through the ditch, and our theory was that it would eventually make all the canal we needed; but under the surface soil there was a stratum of close clay gumbo, almost impervious to water as India rubber, and after six months of washing I examined it and it had made no impression on the gumbo. Only a small ditch was cut. After the sand washed out from under the gumbo it would break off in lumps and settle, and the ditch would work back, but how far I don't know. This ditch was in the original contract, and when it was accepted from the contractors, or taken as it was from the contractors, we had entirely exhausted our funds, and had no means to perfect anything. We simply had to take the work in the condition it was, having no further funds had to stop right there. We never accepted it as being completed in accordance with the contract. It is perhaps fair to the contractors to say it might not have been their fault, we could not pay them to make it any more perfect; it was not perfect. As we were not prepared to pay contractors any more money we did not call upon them to carry on the work to specifications. Witness examined Mr. Corthell's map, which shows the work as it was intended to be.

Testimony Geo. W. Jo

I remember the Shaw and Rupert case, but not the date of the decree to cut the levee. After the decree our action was simply to insist on the persons concerned in the district making provision for meeting the Shaw & Rupert judgment or on their failure to execute the decree by cutting the levee. The commissioners published in the Hannibal and Pittsfield papers perhaps the whole decree or a synopsis of it. I do not know whether the Palms case had been commenced at that time.

mony of
W. Jones.

After the decretal order in the Palms case, I think the commissioners conferred together in regard to the action they ought to take. We never formally accepted the appointment by the
49 *a* decree; I think we were all present in court at the time. I don't think we formally refused to accept it, nor do I think we formally accepted it.

We had no conference in regard to executing a release of the trust deed. I had a letter from some one that a meeting had been held, that there was a general feeling that the deeds of trust should be released, and Mr. Wheelock and myself signed a release; the deeds provided for a release. Some money was collected under the trust deed and expended on the lands. Some groups of land owners not included in the trust deed did work on the levee. These groups or committees controlled the work absolutely in their respective districts. The work was credited on their assessments under the trust deed; we exercised no supervision over them further than to give credit for the work under the assessment. There were three or four breaks in the levee while we acted as trustees. Mr. Spencer controlled one of these groups of land owners who worked on the levee; Mr. Clark was in charge of some; Mr. H. B. Dodge was in charge of one near Rockport, and Mr. Donahoe kept charge of the accounts.

When a break occurred in the levee the land owners in the vicinity formed themselves into a group and took charge of the work, controlled themselves and did what work they could, and we made allowances for the work done by each. I cannot tell how much was expended under the trust deed. When the break occurred near Hannibal the C., B. & Q. and Wabash railroads furnished assistance. When I left Pittsfield in 1878 they were still at work under the trust deeds, and I don't know what was done after that; nothing was done that I know of after the formation of the new district.

50 *a* Mr. Greene: I will not close with Mr. Jones, as there are some questions we will want to ask him in regard to something that appeared in his former answer or testimony, I don't know which.

C. N. CLARK, recalled for complainants by Gov. Palmer: Testimony of C. N. Clark. Recalled.

The work on the levee stopped in the winter of '72 and '3 at what is known as the great cut-off; some of it was supposed to be finished and some not; a large number of men were required to do the work at the cut-off at the head of the Sny where the embankment was 33 feet high, as I recollect it. Some time in the summer of '73 the bondsmen of Skelsey, Fuller & Pierce took hold of the work. The work was prosecuted during the year of '74 and into '75. Then the contractors ceased work and there was no more work done for several years.

The first break in the levee was on the 18th day of April, '76, being a mile above the head of the Sny in Adams county, and later on over 900 feet went out opposite Hannibal, being a portion of the railroad embankment which we had appropriated and were using for a levee, and about the same time a break occurred at Mud Slough. So far as it ever was repaired at that time the work was done by the land owners together with the help they received from the Wabash and C., B. & Q. R'y Cos. The deed of trust was then being prepared; the first proposition to include 60,000 acres in the trust deed failed, and at a subsequent meeting it was decided that thirty thousand acres would be the amount insisted upon to go into the trust deeds. The Wabash railway company furnished cars and an engine to haul material to fill the break in the Wabash embankment; the land owners loaded and dumped the cars and the C. B. & Q. furnished the track on which the material was hauled. Mr. Spencer repaired the break at Sand Slough. Beaty, Dodge and Donahoe formed a committee who filled the break at Mud Slough. The means was furnished by land owners under the deed of trust and contributions. A. W. Little, Hathaway and myself constituted the committee at Hannibal. There was no break in '77 or '78. There were places where levee sloughed off but we had no money to repair them. There was a break in '80 or perhaps the fall of '79, the first being a small one about a mile north of the Hannibal bridge; it was restored by the land owners. The trustees under the deed of trust would make an assessment of fifty cents an acre to make repairs, but the work was usually voluntary. If parties owed money on assessments receipts were given which were handed over to the trustees. The receipts generally went to the land owners from those who had the work in charge. I had little to do with the work after the new organization of the district in 1880. There were several of breaks in 1880; they occurred in July and caught the wheat in shock. The new district has at-

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tempted to keep the levee in repair since that time but there have been numerous breaks. These have been filled by the commissioners and by the general government of the United States. An appropriation of one hundred thousand dollars was expended. The trustees under the deed of trust collected an assessment in 1877, and they made an assessment in '78 of fifty cents an acre, a portion of which only was paid; after that no effort was made to make a collection under the deed of trust and the trustees were not called upon to exercise any authority that I remember now of at all. The deed of trust was not cancelled until perhaps 1887, but it had been inoperative and nothing done under it since the assessment of '78; the trustees had not been called upon to exercise any authority whatever, and the land owners simply, according 52 *a* to the deed of trust, met and asked the trustees to discharge the trust, remove the cloud on the title of their lands. The new district was organized in May, 1880, and the breaks did not occur until July when they took charge.

Cross-Examination, by Judge H. S. Greene.

When the levee did not break it suffered some damage from water from the river and from rains; at its exposed parts abrasions occurred, and they sometimes cut into the embankments a third or a fourth its depth; it was also cut down by rains. The levee was constructed of alluvial soil, varying from black gumbo to a light sandy soil, of the form of deposit usually found in the valley of the Upper Mississippi. There was a considerable percentage of the material in the levee washed down each year; I estimated it would require from fifteen to twenty thousand dollars annually to restore the ordinary wash and abrasions without any break or action of the Mississippi River.

Every break that occurred on the levee prior to '80 occurred by going through, not over it, and even when the water was from two to four feet below the crown of the levee. The money being short so the slope was not maintained. The base of the levee was five feet to every foot of elevation. It varies from forty-five feet to three hundred in width at the base.

The levee was greatly affected by the construction of the Hannibal bridge. After the high water in '76 the bridge company discovered the scouring of the river was so great as to endanger their piers, and they placed rock rip-rap around the piling, until now there is a stone bottom extending across the Mississippi River, and it is an obstruction to navigation and dangerous to the levee. Each year the railroad company has added more stone around its piling.

S. B. BIRCH, called by Gov. Palmer, testified as follows: Testimony S. B. Birch

Have resided in Hannibal, Mo., for nine years, in connection
53 *a* with the Courier-Post, formally Hannibal Courier. There are files of that paper in the office from '72 to '75, being bound and in good condition. I have a paper in my hand which I call an index or statement of articles appearing in the Daily Courier during the years '72 to '75 inclusive. I looked over the files and examined the articles myself, and had them taken down by an amanuensis. This paper is a synopsis of the articles, with the date of each. These articles were not published while I resided in Hannibal, and I knew nothing of their publication except as I found them in the files of the paper. A number purport to be copied from other papers. Do not know who wrote the articles.

Defendants object to the admission of the list or index offered in evidence; first, because the said list merely purports to give a synopsis of certain articles, and is therefore merely the opinion of the party making such synopsis of what the substance of the thing was; and secondly, because if the original articles themselves were offered in evidence they would be wholly incompetent, as they do not purport to come from the defendants or any of them; and thirdly, because the list or index is wholly irrelevant to any issue presented in this case.

The Courier-Post is published in Hannibal, Mo.

This "Index Exhibit" appears on pages 190 to 199, inclusive, of this Vol., begins with the date April 16th, '72, and ends with date Nov. 13th, '75, and contains extracts from, or synopsis of, about 60 articles and notices which are said to have appeared in said paper, giving details of the progress of the levee work, etc.

M. D. MASSIE, being called for complainants, testified as follows: Testimony M. D. Massie

I have resided in New Canton, Pike County, Ill., since about
54 *a* 1854. It is in Pleasantvale Township, being No. 5 South, Range 6 West, and adjoins the levee district. My business is merchandising, milling and grain dealing, and have been engaged in this business 27 years. Have been acquainted with the Sny bottom lands since a boy. Witness gives outlines of levee district as stated by other witnesses. It is about five and a half miles from New Canton to the Mississippi River, and about a mile from the town of New Canton to the line of the levee district; about 20 miles from Hannibal; about 15 from Louisiana, and about 27 from

ony of Massie.

Clarksville. I met a few times with the gentlemen who were organizing to start the levee scheme; acted at one time as deputy treasurer for them, suppose it was in '70 or '71. I find my own name on this paper marked exhibited "A 1," where I subscribed for three shares, three hundred dollars. I signed it at my store at New Canton. At the same time it was signed by Mr. Bruster, Mr. Davis and Mr. Howard. After this I was present at a meeting of certain parties at Mr. Brewster's, and I think there were present at that time Mr. Samuel Spencer, Joseph Collins, C. N. Clark, Mr. Perry Wells and Mr. Brewster. I reported the collection of a few dollars; there was some general talking with reference to the Levee Association; think there was no record kept of the proceedings and no publication of them. Think I was treasurer for three or four months. I only remember receiving money from Mr. John Aaron, who then lived in Kinderhook. The attention of witness is called to the original petition, number one, in the county court to the August term, 1871, (not offered in evidence.) I find my name here. Don't remember of any one else being present at the time I signed. Mr. Rouse lived on this side of the river opposite Hannibal, and I think Mr. Mitchell 55 *a* and Mr. Hafner lived there. Mr. Brewster and Mr. Brown lived in this neighborhaad. Mr. Brewster is dead, Mr. Harrison Brown is still living. Mr. J. H. Davis lived in New Canton. He then had a claim to a piece of land which afterwards he had to give up, which is now said to belong to Quinn Goins. The next name on the list is Mr. Hosford, who is dead, and Henry Howard, who is also dead. The next is the name of A. L. Ware, who never owned any land on the bottom at all; and then the name of John Head, a non-resident, and I don't know that he owned any land; C. E. Dike is dead; Joseph Jean is living, and then owned 160 acres, which he afterwards sold. The next, Harris Palmer, is dead; he then lived in New Canton; the next, Geo. McFarland, is dead, and Cicero Gard and Orlando Shipman are living, I think. The next is Benjamin Saxberry, who is dead. He lived on the river bank, but never owned the place; I notice names here that never owned any land at all; I think the land belonged to Widow Lamberton. The next is James R. Campbell, now living in Scott county, but he then lived in the levee district; and John H. Bradford and Joseph H. Talbert, who then lived in New Canton; Thos. H. Talbert lived adjoining his brother in Pleasantvale township, and James H. Talbert lived in Atlas township, but is now dead; Mr. Withrow lives on the place. The next is F. J. Jackson, who is living on his place in the levee district. The next is H. S. Horton, who now lives in Louisiana. Horace (Horton) is dead. He was the father of Henry Horton. Those are all the names near

our town. Beginning on the list with the name of Mr. Brewster and reading upward, I find the names of Mr. Chamberlain, Mr. McDonald and Mr. Honland, who lives above our place.

Witness is shown a copy of the second assessment called the
56*a* petition of '74. That is not my signature; I don't know, I presume I signed the original. Of the names on that list, C. N. Clark is here present; A. L. Allen, I knew a man of that name, but may not know this man; Henry W. Morris is dead, I think; John Aaron I know; I know J. K. Scarborough; I knew Robert Rankin, now deceased; I knew N. S. Rouse, now living in California; I knew M. M. Aldrich, who is dead; I know M. W. Hughes, who lives in Adams county, and D. Hull, who is dead. Thos J. Fesler, E. Petty, J. G. Adams live at or near Rockport. I knew Moses T. Miller, Norman Brown, William Owsley and Perry Wells, the latter being dead; also Geo. W. K. Bailey, William McIntosh, of Clarksville, Mr. Brewster, who is dead, Mr. Cohen, S. M. Spencer, J. S. Irwin, Mr. Matthews, and J. M. Dowell. I recall one meeting in New Canton about the Shaw & Rupert matter. Esquire Mansfield was the chairman of the meeting. I remember Mr. Hay, of Springfield, was there, but I could not recall who the people were; but my impression is that a majority of them were merely lookers on, idlers who had no interest in the levee at all. There were perhaps 150 men and boys present. I remember a meeting at which we were disposed to congratulate Mr. Clark upon his efforts in behalf of the levee. Perhaps 75 or 100 persons were then present. My memory of meetings seems deficient. In the winter of '73 and '4 I was in Springfield, a member of the Legislature, during the regular and adjourned session; in '72 I was east for a time. I only recall one meeting we held with reference to the levee, and the meeting of the jury before Esquire Mansfield in '72. I may have occasionally seen a copy of the Hannibal Courier; don't think it has any circulation in our neighborhood. The Pike County Democrat is circulated in our neighborhood, perhaps twenty copies are taken there. The
57*a* "Old Flag" was also circulated there; think it had a subscription list at New Canton of 5 to 25. The Louisiana Journal never never came to our town that I know of, nor the Clarksville paper, though I have seen a copy of it away from home.

Our landing on the Mississippi River is called Cincinnati Landing, which is six miles away, which is not the nearest point; a road has been opened nearer.

Testimony of H. Massie. Cross-Examination by H. S. Greene.

I have no knowledge of the time when these papers were signed. This organization called the Mississippi Levee and Drainage Company was the preliminary organization; not being intended to build a levee, but to establish another and different organization under the law of '71; it was merely provisional. To the best of my knowledge the preliminary organization was the first one signed. I did not wish to say in reading off the names that I have mentioned in my direct examination that I knew their signatures to be genuine; I can only identify the signatures of three of those names, namely, C. T. Brewster, Harrison Brown and P. H. Davis. The third paper merely purports to be a copy, and of course I identified no signatures, not even my own, though my impression is that I signed it. The signatures are all in one handwriting. I had the impression it was the Shaw and Rupert matter that Mr. Hay represented when he was present at a meeting at New Canton.

The papers referred to were merely local papers, except the Hannibal papers, which I do not think circulated at New Canton. Think there was no circulation of Clarksville or Hannibal papers there. There were no papers published in or near the levee district, and probably none but weekly papers in the county.

Testimony of G. W. Jones. Recalled. George W. Jones recalled for complainants.

58 *a* I do not recall being present when the jury met at New Canton before 'Squire Mansfield; think that the commissioners were probably represented by Mr. Grimshaw. I don't remember being present at the proceedings of the jury which met at Pittsfield before Esquire Roberts on the 10th of February, '75, though I remember the jury going into the district, and was with them, etc. I think that Mr. Clark posted the notices required under law and probably mailed the notices required. Don't remember of furnishing a list of the names of non-resident land owners or their postoffice address.

We never paid Shaw & Rupert anything in settlement of their case and I have no knowledge of any payment; only heard reports that they had come to some agreement with the landowners or a portion of them; know nothing about the agreement. I understood there was some paper executed but never saw it; do not know what land owners entered into it. Shaw & Rupert communicated to me that the matter had been adjusted and we would not be required to remove the obstruction. I heard there

was some agreement on the part of some prominent land owners and Shaw & Rupert that they should be paid the damages that they had sustained by reason of the construction of the levee across the head of the Sny (which shut the flow of water from their mill on the Sny at Rockport). The relations between the commissioners and land owners were somewhat strained at this time; I think we published notices in the Pike County Democrat and Hannibal Courier. We went to the head of the Sny to estimate what it woudl cost to remove the obstruction and met there a number of land owners. I remember Mr. Henry Morris, Daniel Haffner and Mr. Smiley were present. There were perhaps 10 or 15 persons present. There was considerable opposition to our removing the obstruction. We announced that unless the matter was attended to by a certain day the work would be done by us.

59*a* We did not go to the head of the Sny pursuant to any notice, and did not give notice of our intention to go there. We only intended to make an estimate that day of what it would cost to do the work, and then the landowners began to bestir themselves. I don't know the time of this meeting. I don't think that Mr. Noah Rouse was there. I think possibly Mr. Clark, Mr. Greene, Mr. Henry Morris, Mr. Daniel Haffner, or his son George, and Mr. Waller were there. They had large interests in the bottom. I learned from Shaw & Rupert, or from Mr. Donahoe, and from land owners that the matter had been settled; cannot give any names of those who were present at the settlement except those I have mentioned; don't remember the terms, but we as commissioners paid nothing to Shaw & Rupert, and it was not arranged through us as commissioners or indivdiuals. I had nothing to do with it in any way, shape or form. Col. Matthews was the attorney for Shaw & Rupert. Mr. Donahoe was the confidential clerk of Shaw & Rupert and he probably said we have arranged it. The towns of Hannibal, Louisiana and Clarksville are in Missouri across the river from the levee district. The towns on this side are (same as named by other witnesses). There is a postoffice at East Hannibal, at Horton Station and at Atlas, in addition to the other towns named. Bellevue in Calhoun county is below the levee district, but would be the postoffice address of some of the land owners. Shinn is a station on the C., B. & Q. road in the district. Hulls is at the crossing of the C., B. & Q. and the Wabash, in the district. At that time the postoffices were Kinderhook, Hulls Station, New Canton, Rockport, Atlas, Pleasant Hill and Bellevue.

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Cross-Examination by H. S. Greene.

The answer in the Shaw & Rupert case appears to have been filed Aug. 30th, 1875, and the decree in July, '77. I don't
60 *a* know that Shaw & Rupert were ever paid a dollar under that adjustment. About that time their mill at Rockport burned, and it (the water power from the Sny) was not of as much importance as it was when the mill was standing. Soon after that Mr. Shaw died. It was never rebuilt. At that time I recall the following parties living near Rockport who owned land in the district; James D. Rupert, Phillip Donahoe, Samuel Taylor, Isaac Barton, Thomas Ousley, William Dustin and perhaps the Longs, who owned farms on what is called the second bottom, or higher land.

At the time we proposed to cut the levee; it was completed so far as it ever was completed, I think.

Thomas H. Cheney: I have in my possession the files of the Louisiana Journal, published at Louisiana, Missouri, and here produce a number of extracts which I took from those files, which list contains the dates of the said extracts, and they are correctly transcribed from my personal knowledge, being directly copied from the files of that paper by myself. They are marked exhibit "9" and offered in evidence.

Defendants object; first, on the ground of the irrelevancy of the same; second, because there is no evidence of the truth of the statements therein contained, nor even as to the persons by whom the several articles from which the extracts are taken were written.

Exhibit "9," being extracts, or entire articles, from the Louisiana Journal of various dates from December 17th, '71, to July 23rd, '80. Most of these extracts appear to be editorials, some of them articles by E. L. Corthell, remarks by C. N. Clark. The report of E. L. Corthell to the Levee Commissioners of the preliminary estimates in regard to the work, bearing date November 21st, '71, appears to be given in full on pages
61 *a* 28 to 337 of these extracts. Some of the extracts relate to the break in the levee in '76 and the damage done.

Complainants offer a copy of the assessment roll of the Sny Island Levee Drainage District filed May 26th, '80.

Objection by defendants on the ground that it is irrelevant, and that whatever statements are contained therein they are not binding on these defendants, not having been made by them. Testimony Geo. W. J —Recalled

E. J. CHAMBERLAIN, being recalled for complainants, testified as follows: Testimony E. J. Chamberlain. —Recalled

I have been acting as engineer in charge of the work since my appointment. All the strengthening has been done by commissioners. My duty has been to measure the embankment and make settlement with the contractors for work done or paid for by the commissioners, or give statements upon which the commissioners pay the contractors. It is a part of my duty to look after the levee; wherever I or they deemed it in the greatest need of strengthening or repairing, to replace the work at those points. I am employed by the day and work at my own discretion. I have frequently examined the levee from one end to the other, but not all on the same trip. I specially examined it where it seemed to be in danger from any cause. The levee commissioners only have watchmen in times of impending danger, when the water is very high; they are appointed by the commissioners and myself; they delegate to me the same authority that they use in furnishing supplies, ordering and directing the force, etc. It is a part of my duty to keep myself informed as to the condition of the levee. I commenced in October, '84, and was preceded by I. Claire, as engineer, who is dead. The commissioners chose the person to collect levee assessments; for accommodation to the collector I have occasionally collected some taxes, simply re-
62 *a* ceiving the money and signing their name by me. I had little acquaintance with the levee prior to '84; nothing to do with its construction. At that time I was in Kansas or traveling through this state and Missouri. I am acquainted with some of the persons who occupy lands in the levee district. The Congressional townships included in this district are a portion of 3—8 in Adams county, all of fractional township 4—8, a portion of 4—7, all of fractional 5—7, a portion of 5—6, perhaps a few acres in 4—6, all of fractional 5—8, containing only a few acres, all of fractional 7—6, all of fractional 6—6, or all but a few acres, a portion of Tp. 6—5, all of fractional 7—5, a portion of 7—4, the above being in Pike county, all of fractional 8—5 and a portion of 8—4 and a few tracts in 8—3, in Calhoun county. I refer to that portion of said townships which is on the land side of the levee, portions of the lands lying between the levee and the river bank proper. Adams and Pike and Pike and Calhoun are sep-

arated by lines running east and west, and all of those counties border on the Mississippi River.

The south end of the levee is upon Hamburg Bay, its northern bank; the south end of the district I don't know how to answer, it is bounded by the contour lines of certain back water. I think Mrs. Maud Selby now owns the land formerly occupied by Baker and Rock; they do not now occupy it. Thos. S. Jennings has been dead for some years. Joseph Turnbaugh owns land in Sec. 28, Tp. 7—4, and lives on it; his sister, Viola P., owns land in Sec. 29. Z. T. Webster lives near Pleasant Hill. J. A. Thomas died two years ago or longer. I don't know whether the district has increased in population since I knew it; several new farms have been opened near the levee. I know nothing about the titles
63 *n* of occupants of lands along the levee; but I can state who some of the occupants are and their names as carried upon the collector's books. Beginning at the head of the levee the first is Ernest Brockmeyer then one ——— King, these farms being in cultivation when I first knew them in '84; then next came the Miller boys, whose first names I don't know. Then Catharine Y. Meredith is the first below the Sny dam; the next I don't know; then comes Mrs. M. L. Smith, then the A. J. Stillwell tract, which carries us to the Wabash road. The Stillwell land has been sold by order of the county court in partition. C. M. Alger owns the next tract; then there are a few small lots in Shepherd, which is not a laid out town. It is in township 4—8. Then D. L. Hafner owns a small tract; then —— Packard and then the King estate. The next is William Stickhorst, in about Sec. 16, Tp. 4—8, being the old Rouse tract. Certain Hannibal parties, Sanders, Morris, Thompson and Hafner, owned all of Sec. 16, 4—8. Mr. Dane comes next, and then S. M. Spencer, running down to probably Sec. 26. The John McTucker heirs own land in 36, adjoining Spencer on the south. My father and John McTucker once owned land in partnership, the latter having died probably in '72 or '74. Next I think there is a small fraction of Tp. 5—8, owned by Stolte, which formerly belonged to Morris. Next comes Walter Morris, probably in Sec. 6, 5—7. Next adjoining Sec. 6 is known as the commissioner's tract, and the M. M. Aldrich is in fractional 5—8, 6, 5—7. The next is probably John Smith and J. Webb in Sec. 7, 5—6. Think the next tract is J. H. Dickerson's. The next is the James farm and the next man is John B. Shepherd. I have heard that Moses Wagenor lives on the bottom at the big cut-off. The next tract of land is owned by J. V. Price, and then H. B. Atkinson, near the cut-off, probably in Sec. 22; then

64 *a* Samuel Pfrimmer and then M. Delano, probably in Sec. 26. Cincinnati is in Sec. 26, 5—7, on the southeast quarter, I believe. One Odiorne formerly owned the land; then Rodgers, then Dr. Maurer, then Cliff, and then Scallett and Odiorne; the latter is dead and his children are William and Emily. There are a few acres in Sec. 1, 6—7, owned by Munger brothers, and they claim all the land contiguous to the levee until we reach Sec. 7, in 6—6. Then comes H. B. Atkinson in Sec. 7, and a small tract claimed by J. H. Dickerson. Below the Dickerson tract is one claimed by Poston, in Sec. 8, some of it being held by a tax title which the commissioners sold.

Testimony of E. J. Chamberlain.—Recalled.

Then comes John Burns, who claims a few acres in Sec. 17, then a small corner of Sec. 9 owned by William R. Wills. The levee commissioners own all of Sec. 16 which is within the levee, probably three or four acres, owning in fee for right of way. Then comes a small tract owned by Dan Bates. Then comes the land owned by Samuel Camp and sons, which extends down to land owned by Stephen Shaw, and his mother Elvira Shaw, being the son and widow of the Shaw who was a partner of Rupert. They own land in Sec. 26 on which is Gilgal or Scott's landing; then James Rupert owns a tract in 26; then McCune and Meriweather own for possibly a mile in Sec. 35 contiguous to the levee. Then James D. Rupert claims the next tract through Sec. 2 Tp. 7—6. The widow of H. Otweil then claims a small tract, probably in Sec. 2, 6—5. Then comes James Pierce; then Murray and Post, who own land in the southeast of 12; then —— Mitchell claims a tract in Sec. 13, which takes us to the Louisiana and Atlas road. Next below the road a tract is claimed by J. R. Weaver, a portion being in Tp. 7—6 and a portion in Secs. 13 and 18, 7—5. Then there are several small tracts about whose ownership I know nothing, in Sec. 18, 7—5, I think. Then next below the C. & A. R. R. I think Ed Glenn claims the land, in Secs. 18 or 19, 7—5. And next below that is the Silas Mackey tract, probably in Sec. 27, which is said to be sold to Jordan and McAlister. The next is Calvin Gruel, possibly in Secs. 27 and 35; then a small tract unknown to me; then the tract of Elijah Petty in Sec. 36. I think that Thos. Ordiorne is dead and that his heirs control a tract in 36. The next tract is in Calhoun Co., on our books as McIntosh, and probably controlled by John O. Roberts, in Sec. 1, Tp. 8—5. Then below the Clarksville and Pleasant Hill road Warren S. Tibbits exercises ownership for some distance, the lands but few of them being enclosed. McIntosh claimed the tract below Tibbits', probably in Sec. 8, and I think ——— Shultz has property in Secs. 15 and 23. That carries us to King's Lake, I

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think. One Anderson claimed land on the southerly bank of the lake, and then comes the Rous and Baker tract in Sec. 25, but they claimed they did not know the ownership of the lands.

Hamburg Bay might be called the mouth or outlet of Bay Creek, and was deep enough to allow river water to stand there at most stages. That is the southern terminus of the levee. The narrowest point in the levee district is at the upper end where the district comes to an apex. The width of the district is approximately from four to six miles, except at the upper end. The lower end is divided by the bay; I don't know its width. The lower end of the district is the high water mark, which is made by back water, and is defined by a concave line, the lowest land being towards the center of the district. The lands slope gently from the bluffs to this high water line, and the land on the east side of this district is all occupied. Bellevue is a small town of three or four buildings and a postoffice, in Calhoun county, 66 *a* probably six miles from the lower end of the district. There are a few roads in the lower part of the district. The next point near the levee district is Pleasant Hill, a postoffice, perhaps six miles from Clarksville, Mo. There is no railroad from Clarksville, a place of 2 to 5 thousand inhabitants, across the bottom. Atlas contains a postoffice and probably 50 people. It is about five or six miles from Louisiana, Mo. I don't know its population, probably five to eight thousand. The next town is Rockport, four or five hundred inhabitants, about five miles from the nearest point on the levee, which is Gilgal or Scott's Landing, formerly a steamboat landing. There is a wagon road to the river. (Witness then names other towns as given by other witnesses.) Shepard is a hamlet of three or four buildings and a postoffice. There are two postoffices on the Louisiana branch of the C., B. & Q. R. R., one called Seahorn and the other Fall Creek. This railroad runs parallel with the Bluff road at a distance of half a mile to two miles from it. Hastings is in Adams county, probably eight or ten miles from the district. The upper end of the district is perhaps eight or ten miles from Quincy, which has possibly twenty thousand inhabitants. Pittsfield is 16 or 18 miles from the district.

Cross-Examination by H. S. Greene.

The eastern boundary of the district is an irregular line varying with the elevation of the land.

G. H. WHITTACRE, recalled for complainants, by Gov. Palmer, testified: Testimony G H. Whit —Recalled

Am county surveyor of Pike county, was elected in '84; live in Pittsfield, and have been deputy surveyor under Mr. Claire, commencing in '80. I was on the jury at the formation of the Sny Island Levee Drainage District in '80. We commenced at the upper end and went down over it, went from Pittsfield to New Canton, Kinderhook, Hannibal and Louisiana, and from there down the levee to Clarksville, towards Hamburg Bay. There was at that time a levee there, commencing in Tp. 3—8 in 67 *a* Adams Co., about 6 miles above Hannibal, and extending down through Pike county into Calhoun, and ending in Tp. 8 South 4 west of the 4th p. m. We were to make an assessment to repair and maintain the levee, known as the Sny Island Levee. We had to examine the levee also. A part of the time we went out in the bottom and part of the way we went down on the levee. We were acting under the authority of the Sny Island Levee Drainage District, the commissioners. We were appointed by the County Court. Witness identifies the names of the jurors. We didn't go on to all the land. I heard Mr. Chamberlain's statement and he told all I know about the owners of the land. A great deal more land has been opened and farmed than there was in '80; a good deal of timber has been cut off; a great many farms opened up. The land is mostly occupied by renters. The locations of the towns are about as Mr. Chamberlain gave them. Shinn is a station of the C., B. & Q. road on the bottom, Sec. 36, 4—7. Hulls is on the bottom in Sec. 21, 4—7, but don't think it is in the overflow district. The public road runs near the bluffs and between them and the district. This is a dirt road and lies east of the entire district and runs through the towns named, beginning with Kinderhook at the upper end and Bellevue below the lower end. That road is generally six miles from the river, but narrows at the high places. Both Louisiana and Hannibal get some trade from the levee district, and the towns joining the district get a good deal of business from it. Pleasant Hill is about 9 miles from Louisiana and about 6 miles from Atlas. I know few owners of lands in Calhoun county in the district, except H. S. Carroll and John O. Roberts, who live in Clarksville. Witness examines copies of the four trust deeds in evidence. Does not know the signers of those instruments.

Isaac A. Claire was county surveyor and was employed as 68 *a* levee engineer. I had charge of some work on the levee under him in repairing the break at Clarksville; work let out by so much a cubic yard. Mr. H. B. Dodge did the work; I don't

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know whether he owned any land at that time or not, in the district; he does now. I know Samuel Clark who lives near Kinderhook. I know a man named John Reed who lives on Sec. 17, Tp. 4—7. I think one E. C. Bridge lived in the district. I know John Clutch; he lives near Kinderhook. Various men the witness doesn't know. I furnished some of the information contained in book "exhibit X" in this case, furnished addresses or residence.

Cross-Examination, by H. S. Greene.

I do not pretend to say that the parties I have named actually owned land; I know nothing about their title. Went over the levee as one of the jury. My recollection is that when we made our assessments it was to repair the levee which was broken. The cost of the work was to be determined by the commissioners and engineer. We were to assess benefits; I don't think there were any damages. Mr. Kendall was from the lower end of the district and claimed that the levee was of no benefit to him, as the water from the lower end of the levee backed up over his land; and I think on account of a couple of creeks that run into the Sny, that it didn't benefit them much. I don't think we were to determine the cost of repairing the levee. The commissioners and engineer determined that a certain amount was to be raised, about a dollar an acre, and we assessed it on the land. As to most of those persons named by Mr. Chamberlain and myself I know nothing of their titles, and only know they were in possession, or claimed to be in possession, of the land.

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C. N. CLARK recalled by Gov. Palmer.

Before the levee was built there had been something in the way of improvements on the banks of the river above Hannibal, where there were a couple of farms in cultivation; opposite
69 *a* Hannibal there was a warehouse, a steamboat landing; also the ending of the Wabash railroad, and an arrangement to transfer cars over to Hannibal; a bridge was then in course of erection over the river. Hannibal was then a city of about 10,000 inhabitants. Mr. Hafner had a farm below Hannibal on the bank of the river on the east bank, and then came the King and the Rouse property.

On the west side of the river there was a station at Saverton, a few miles below Hannibal, then a store and postoffice. There was a railroad along the west bank of the river. Then

came Louisiana, about 20 miles below Hannibal, being a town of 4,000 to 4,500 inhabitants; and about 12 or 16 miles below Louisiana was Clarksville, a town of 1,200 or 1,500 inhabitants—no other places on the west bank of the river. Witness describes the location of Kinderhook, Hull, New Canton, Rockport, Atlas, Pleasant Hill and Cincinnati as described by other witnesses. Fall Creek, a station on the C., B. & Q. was not in existence when the levee was built. New Canton had possibly three or four hundred inhabitants; Rockport perhaps 150 or 200 inhabitants, and at that time there was a flouring mill there owned by Shaw & Rupert, run by water power from the Sny. Atlas consisted of three or four dwelling houses and one store and postoffice. Pleasant Hill contained possibly 350 people, and is on the line of the C. & A. railroad, which was then being built. There was a little place called Jennings Mill in Calhoun county, a grist mill owned and run by a man named Jennings. Then below comes Bellevue, a town more in name than in fact. There was a good dirt road running between the bluffs and the east side of the district running south from Quincy near the east side of the entire district and further in a southeasterly direction. There was a gravel road from East Hannibal running in a northeasterly direction to 70 *a* the bluffs, about six miles. There was another stone road partially built from Louisiana toward Rockport and Atlas, having broken stones about one-third of the way; it ran about five and a half miles to the bluff, about half-way between Atlas and Rockport. Another road was built from Clarksville to Pleasant Hill and covered with stone a part of the way. All these roads connected with ferries giving access to the towns on the west bank of the river. I cannot estimate the population of the district. It was thinly peopled. The strip of land along the bluff was densely peopled as farm districts usually are, all along the east side of the district. In cultivation and in very fine condition, farms, etc., along the southwest portion. There was but a small portion of the land in the levee district in cultivation. The population was small, yet there were some cabins and residences, and men living there; some occupants at Gilgal, Cincinnati Landing, East Hannibal and at what is known now as Pike, opposite Louisiana. Mr. Tibbits was living opposite Clarksville, and on the road from Clarksville to Pleasant Hill there were farm houses all the way, the first time I went over the road. Noah Rouse had a fine farm south of Hannibal on the river bank at that time. Before the law of '71 was enacted I did not travel over the district south of the line running west from New Canton. After the law was enacted I took the subscription paper and petition for the district and visited nearly every portion of the Sny bottom where it was known

that a land owner lived or could be found. I went south as far as Bellevue. I knew Col. G. W. K. Bailey who did some of the work as contractor, but I don't remember of having any talk with him until after the work begun. He owned land far down between Hamburg Bay and the Mississippi river, very near the terminus of our first survey. Col. Bailey did some work as a
71 *a* contractor on the levee. So far as I am aware Mr. Jennings knew nothing about the progress of the work. I think he was dead at the time we constructed it. I saw at that time Andrew Tibbits, am not certain that was his name, who lived a little below and opposite Clarksville, just below the mouth of the Sny. I visited him and had conversations with reference to the building of the levee. He lived just a little inside the line of the levee. I had conversations with all of the land owners whose names are on that petition for the construction of the levee. I remember a Mr. McIntosh who lived at Clarksville. Mr. Jennings had nothing to do with the construction of the levee, though he favored its building. H. P. Dodge was employed on the levee, probably under Skelsey, Fuller & Pierce, but he was not at that time a land owner. I don't recall any other land owner who was connected with the original construction of the levee.

I circulated a subscription for the temporary organization at the same time with the petition for the organization of the levee district, carrying them both over the same territory. The petition was presented to any person living in Calhoun county whose names appear on it. I don't know how many persons resided on the Sny bottom at that time, the intention was to get the name of every land owner owning land on the bottom. A number of the petitioners lived in Missouri, and I obtained their names. I know what has become of some of the petitioners. John Morris is dead; Noah S. Rouse went to California, perhaps six years ago; Dr. Mitchell is dead. D. F. Hafner owned land in the district and resides a little west of Hannibal. Amos J. Stillwell is dead, and the estate is in the hands of his son William. There were ten thousand dollars of bonds in Mr. Stillwell's hands as security for Skelsey, Fuller & Pierce for money advanced, and they were not re-
72 *a* deemed and were advertised and sold by Mr. Stillwell at 60 cents on the dollar. Mr. Stillwell signed this petition.

From page 529 to 541 inclusive. Witness states his knowledge of the signers of the petition of '72, whether living or dead, their residence, if known, etc. He does not remember the following parties, who are represented as having signed that petition:

James Davis (but knew James T. Davis), Francis Doughty, S. W. Martin, A. J. Woodard, R. B. Steadman, N. H. Close, A. L. Ware (Weare), John Head, C. E. Dike, A. Myers, A. Benjamin, W. M. Haines, J. M. Henry, D. W. Hartsock, C. M. Brammell, C. E. Moson (or Mason), Edwin Draper and brothers, Granville Bookout, William Pratt, Calvin Neel, William Hicks, Jacob Turnbough.

On pages 541 to 544, inclusive, witness gives some information in regard to the signers of the petition of '75. Witness procured the signatures to that petition. He was questioned as to only a few of its signers, and did not remember D. W. Barry, Kennedy Long, S. W. Taylor, James R. Wells.

I remember of mailing notices through the postoffice to the land owners. In all my statements I refer to land owners by reputation only, by no knowledge of my own whatever.

It is impossible to tell to whom I sent notices. I used the list of signers of the petition as a mailing list, and supplied any deficiencies to that I was able to find, but I have no list of that deficiency. I only recollect in a general way that I performed the duty assigned me by the commissioners. I had before me when I mailed the notices a list of the land owners who signed the petition. I had no list beyond that. Mr. Chamberlain and I 73*a* made diligent search for all the land owners on the bottom with a view of getting their names to that petition, and nearly all we found signed it, and I remember he told me where to send the notices. These notices were to appear before the jury. I think I sent notices to all who signed that petition; presume I followed the same course in regard to mailing notices under the petition of '74 and '5 that I did before; used all the information I had in relation to it. I don't recall comparing the petitions of '72 with that of '74 and '5, but presume I did. Have no doubt that I sent notices to all who were reported to me as being land owners. I don't recall the post offices to which notices were sent, but sent the notices wherever I supposed their postoffices to be. I have no independent recollection about it aside from my affidavit. I have no doubt there were residents in the Sny bottom I did not see at that time; I was hunting for claimants, owners of land.

At that time the bulk of the bottom was in its wild, unimproved condition, though some improvements from one end to the other, generally of a cheap nature, nothing very valuable in the way of buildings, etc. There were some "squatters" here and

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there on the bottom. There were some substantial improvements along the gravel road between Hannibal and the bluffs, several respectable farm houses and a race track. Henry Morris had a saw mill there and quite a number of houses along the line of this road. There were houses on each of the three roads running from the Mississippi river to the bluffs, and there were isolated improvements between these roads. The slope adjoining the bluff was all in cultivation.

At that time I bought 440 acres of land of one Colvin, in its native state, and paid him $4.50 an acre for it. That was higher than the value of some tracts and lower than others. I paid $12.00 per acre for a tract east of Hannibal (afterward sold to A. J.
74 *a* Stillwell), at about the time this petition was filed with the court, and I was satisfied we were going to build the levee. This land was owned by a party in Indiana who knew nothing about the levee. Its building did not affect the price of any land I bought. After the work began it affected the price of land materially, and it continued to go up during the time of construction. It is difficult to tell the average increase in the value of land, owing to extremely varying conditions. The tract of land I bought before the levee was constructed for $4.50 per acre I sold two or three years ago at the same price, which was all I could get for it, and I think its value now. Don't think it has increased at all in value. It is near the great cut-off in Tp. 5—7. It is no more subject to overflow than the average of land, in fact being near the upper end it is considered safer than the lower end. I bought it for a choice piece of land, and so I consider it. The lands in the upper end of the district have been more affected in value by the levee than any other, because there are less chances that a break in the levee would damage them, and the improvements are better. While a break in the middle of the levee would damage all the land below it, it would not injure the upper end. I am told that the lands directly opposite Hannibal for which I paid $12 per acre are worth from $30 to $33 per acre with all the improvements that have been placed on them. The lands opposite Louisiana are more valuable than they would be without the levee. A great many more people have gone to farming on the bottom, largely made up tenants who rent from non-resident owners, some owning the lands on which they live. In the upper part of the district the lands are largely owned by Hannibal people, who rent them to tenants. At least 50 and perhaps 60 to
75 per cent of the lands have changed hands since the levee
75 *a* was originally constructed. The high water mark of '51

often included a portion of the land belonging to those who lived on the bluff road above the high water. I think the J. A. H. Morris land in Tp. 4—8 was worth $12 an acre before the levee was built.

From pages 553 to 557, inclusive, the witness states what he remembers about certain signers of the petitions of '74 and '5, their residence, etc. He does not remember H. Edmundson, N. S. King, C. E. D. Bridge, A. J. Woodward, Bethany Kennedy and Dean Patterson.

Up to the finishing of work on the levee the lands in the district probably doubled in value, and the lands in the upper half of the district probably increased more than that, resulting from the buildings and improvements put on them. There were a good many sales of lands from the time the levee was commenced until it was finished. Some of the purchasers lived at a distance, such men as Col. Matthews, Judge Higbee and others buying after the work commenced. Perhaps it might be said there were "extensive sales." As the work progressed Hannibal men made considerable purchases of land. The Mungers bought since the construction of the levee. Charles M. Alger purchased recently. I think that A. J. Stillwell bought 400 acres in addition to some tax titles. J. H. Dickason is a large owner, living at Hannibal, and purchased since the levee was built. William H. Hatch about four or five years since purchased some 240 acres, and lives near Hannibal. Messrs. McIntosh, Carroll and Roberts, of Clarksville, Mo., own considerable land.

I have no personal knowledge of the settlement with Shaw & 76*a* Rupert. I think I remember meeting at Hannibal with some land owners, and also at Clarksville and Pittsfield about that business. I think we did hold a meeting at Hulls with reference to that business. I do not remember who was present at the Hannibal meeting, probably Morris, Spencer and some others, with Shaw & Rupert. At the Clarksville meeting Messrs. Shaw, Rupert, Irwin and myself were present, and probably William McIntosh. I don't remember any others. The object of these meetings was to avert the order of the court in regard to cutting the levee. I was indignant with Shaw & Rupert on account of their exorbitant demands, and did not go into the meeting at Pittsfield, though I was frequently near where the meeting was held. I only heard that a price had been agreed upon and payment made and the levee would not be touched. I did not myself pay any part of

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it. I don't know who did. I don't know that they have ever been paid, and I don't think they have. At least I don't think they have ever been paid in full. I heard that the parties making the compromise had agreed to pay Shaw & Rupert twenty thousand dollars. If there was ever any written paper I have no knowledge of it. I should suppose the date was some time in '77. I don't think that any assessment was ever made on the lands to pay Shaw & Rupert, and I don't think that any one ever agreed to pay them $30,000.00.

By consent Mr. Clark may be cross-examined when called on behalf of defendants as to improvements and valuation and the value of land within the Sny district at various times from the inception of the first levee to the present time.

Mr. Greene: "All objections to questions asked on behalf of complainants and all questions asked on behalf of defendants during the present examination are to be confined to such defendants as are represented by Hay, Greene & Humphrey.

Cross-Examination by H. S. Greene.

77 *a* The lands in the levee district are located in what is known as "The Military Tract," being lands reserved by act of congress for military services, and taken up with military script. At the time when these petitions were circulated large portions of the lands were claimed and understood to be owned by non-residents whose residences were unknown. So far as we could find within a reasonable radius of the bottom claimants of lands on the bottom, those men we hunted out and sought their names to the petition asking commissioners appointed to do this work—so far as I could find them personally. We claimed to have found a large majority of the number of claimants.

A large portion of these being claimants of very small quantities. I think we found more than half the acreage and more than half the number of claimants.

Re-direct-Examination by Gov. Palmer.

I do not know of a resident landholder whom I did not see, but knew of some non-resident claimants of lands. I have never made an estimate as to the number of acres owned by the claimants who signed this petition, and it was not required by the law.

Testimony C. N. Clark —Recalled.

I cannot tell how much was paid in money to the preliminary organization. Possibly two and a half per cent. or more on $125,000.00.

Complainants offer exhibit "14," being a certificate of the clerk of the County Court of the original organization.

Stipulation.

Stipulation: It is hereby stipulated between the complainants and the parties represented by Hay, Greene & Humphrey that the complainants should be at liberty to offer in evidence abstracts of lands of parties who owned or claimed to own lands
78 *a* in the Sny Levee District at the time of the inception of the levee proceedings or thereafter, conveyances to third persons since the commencement of said proceedings; that such abstracts shall contain the names of grantors and grantees and shall contain such extracts from the deeds themselves as complainant's counsel shall desire with the privilege to either party of referring to the original deeds themselves or to records thereof when called for. It is further stipulated that the abstracts of lands of each of said defendants shall contain a description of the lands embraced therein and dates of conveyances.

Testimony C. N. Clark —Recalled.

From pages 569 to 577 inclusive Gen. Palmer questioned witnesses and divers other persons present in the room as to their knowledge of numerous defendants named in the supplemental bill in this case. He identified a number of the defendants, but failed to obtain any information as to the following parties: A. L. Allen, Thos. J. Able, James Acods, Frank Beebe, John E. Dean, Enos Devoe, William S. Fleck, —— Greene, Clarkson Gridley, Jesse F. Johns, Thos. King, Harry Miller, Minor J. Muddleson, Dennis Morgan, Albert Beebe, Hannibal W. Bistaker, Newton J. Parker, George Robinson, Harlow Spencer, Herbert Spencer,; but witness identified the following: Brewster Quio, Enos Chapman, Jno. C. and Sarah S. Colvin, Thos. Clarkson, —— Dickerson, Chas. C. Duvell, Jas. M. Davis, Henry Edwards, W. H. Fisher, John C. Hampton, James House, Sophie Hull, Mr. Haskins, Mr. Hoffman, Sam Curran, J. D. Kiser, Kennedy Long, Susan F. Ramsey, Mrs. Bryan Stillwell, Silas Stewart, Jos. M. Shipman, John W. Smith, Mr. Staples, H. D. Shaw, Susan B. Shibley, Florence A. Strong, John E. Sloan, Robt. J. Stillwell.

Descriptions of individual conveyances containing exceptions
79 *a* of covenants of warranty, of levee assessments, of which the following are instances:

Warranty deed to C. M. Alger from John R. Holmes, Feb. 11, 1890, "except for taxes and assessments for levee, drainage, agriculture, sanitary or mining purposes."

Warranty deed to Brittendam Bros. from D. L. Hofner and wife and John Jordan, May 21st, 1890, except "any claim accruing out of the use of levee lands, many assessments made for payment of taxes of same."

Warranty deed to Brittenham Bros., John Jordan and Wm. R. Sitts from Lot Southard and Fred Wolier, Jr., and wife, March 4, 1879, "all levee taxes and all levee assessments and all deeds of trust account of same, which the party of the second part agrees to pay."

Warranty deed to Richard H. Baker from Daniel Simly, January 16, 1883, "except levee assessments."

Warranty deed to Christopher D. Green from H. R. Motley and wife, Sept. 18, 1888, "of any bond issued or draft incurred in the construction of the Sny levee, or by reason of any claims for moneys expended by any person or persons whomsoever, for levee or drainage purposes prior to the formation of the said Sny Island levee."

DEFENDANT'S EVIDENCE.

TESTIMONY OF CHARLES N. CLARK.

Have resided in Hannibal, Mo., sixty-five years. Stated in former testimony that meetings were held in various portions of the Levee District. First, near Payson, at the residence of 80 *a* S. M. Spencer. The next was at Kinderhook. Not so numerously attended as the first. Next at New Canton; a week or ten days after the first. The object was to get parties together and let one talk do for all. The next was at Rockport. And the next at Pleasant Hill. Was making an effort to reclaim the district known as the Sny Bottom. A law had been passed by the Legislature authorizing work to prevent an overflow on the lands. Under that law I was attempting to cross the district and raise the preliminary funds to meet the expenses. Had a copy of the bill with me. A. G. Chamberlain was with me. He was well acquainted on the bottom.

At the meetings I produced the law and explained that I held in my hand a bill approved by the Governor, and read the sections referring to the construction and the manner of getting the means. A great many questions were asked. Explained that a levee would be constructed under the law by assessments. The law provided

how the levee should be maintained. It was no toy to be built to look at. Got numerous signers to a paper. Made some explanations to all of them. They wanted to know how the levee was to be maintained.

The fact that it was to be maintained by taxation, influenced them to sign. Both propositions were discussed. As to the construction it was to be a permanent thing. That was explained at the meetings. Do not know how many signers we got. (Witness examines papers.) This looks like the same. I recognize nearly all. That was filed in the County Court. Commissioners were appointed. George W. Jones, William Dustin and John G. Wheelock. Actual work was begun in September, 1872. I was constantly employed upon it by Corthell.

Prior to appointment of commissioners he had made an esti-81 *a* mate and reported the probable cost. The figure amounted up to about $400,000. The jury was called out in the fall of '71, and made their reports to the County Court. The work was begun September, '72. Commenced near the south line of Adams county. Stopped there part of the winter. Skelsey, Fuller and Pierce were the contractors.

They did not do anything in the spring. They commenced in the summer '74 and '75. Into '75. Was along the levee frequently. A levee had been commenced before. Work had been done at different times by Samuel Leonard, but had become overgrown with brush and small trees. At the head of the Sny were exactly upon a line with it. It extended a half mile. They simply commenced and done some work there. It did not keep the water out.

This levee was to be up to high water of '51. It was not to be below high water of '51. It was not built that high. I have had experience with handling of dirt. I thought at the time this levee was not constructed on the best plan to keep the water out from the lands. And now I know it was not. The main objection was the excavations made on the inside or the land side. The understanding was they were to get the dirt from the outside, but for some cause the contractors were allowed to make excavations on the inside, and some places were very deep. Such excavations were breaking it down. Letting the water in. And I made such statement to the Commissioners. I was satisfied it would result in failure, and so it has. The levee has been breaking ever

timony of
N. Clark.

83 *a* since. The water would seep through under the levee. The water would go right through. The breaks as in '88 came through that source. The levee was not built right. It was not '51 high water. And the specifications required that the slope should be given to the embankment three feet on the inside.

In a number of places the slope was not more than 1½ feet, making it nearly perpendicular. Not in any way properly constructed. Toward the lower end it was the same. The levee first broke on the 18th of April, 1876, four o'clock in the afternoon. The water gauge was 19 feet and 11 inches above low water. Twenty-two feet was the high water mark of '51. The levee broke first at the little pen or slough in Adams county, 1½ miles above the head of the Sny, and during the night the railroad below Hannibal gave way and about 900 feet of the railroad embankment went under. It also broke 350 or 400 feet of the levee. Something below the great cut-off. Still lower down the water from the inside broke the levee out. Cannot tell how many breaks. But the three principal breaks were in No. 350, 900 and 300 or 400. There had been some few other breaks before.

In case of weakness in '75, a large force of people was called out to watch the break in the levee. This was the first break in the railroad. Prior to '76 a great deal of improvement had been made on the Bottom. People had moved in. Buildings, houses and barns had been built. By these breaks everything that could be destroyed was destroyed fully. I had near 2,000 acres in cultivation at the time. Ruined everything I had with the exception of a little at the upper end. All buildings were washed out.

84 *a* My loss was from $50,000 to $60,000. At that time 60 to 70 per cent. of the bottom had been put into cultivation. One million dollars would not pay the loss of the land owners.

Commissioners did nothing towards building it up. The land owners undertook to stop the water by temporary works and did so partly. The water carried off all the wheat. An unusually large crop had been sown in the fall of '75. I, myself, had some 800 acres. Five or six thousand dollars were expended in repairs by subscription. A mass meeting was called.

I stated I was willing if 60,000 acres of land would go in with me, to authorize a trust deed to make assessments to the extent of 60 cents per acre. I was directed to prepare trust deed. Sixty thousand acres could not be got to assist. A meeting was called and 30,000 decided upon. That effort was successful. Under

that deed of trust these breaks were filled. The principal ones I mentioned. The deeds of trust were executed, I think, during the winter of '76 and '77. In the upper district the land owners raised a crop in '77. The next break was on June 30, 1880. No break from '76 to '80. None of any size.

On the upper half of the Bottom we have raised crops from '77 to '80. In June, 1880, the Bottom was in cultivation. Water 18 feet 6 inches. It broke a little above the cut-off. Eleven miles below Hannibal. Crops doing splendidly. Wheat in the shock. Corn was low but wheat was good. The loss was nearly total. Everything swept away. My loss less than before, because I had retired; but it was large with some.

Much greater than before. More than one million dollars.
85 *a* Do not know how it broke. I was at the cut-off. Trying to stop a break there. We were at the point where it broke in '76 trying to hold it with a large force of men. I did not see it break. Cannot tell how. The reason doubtless was that the borrow pits were made too low. The sandy soil would sweep right under. It was necessary to fill it up. Do not remember how many breaks in 1880. The next break was April 23, 1881.

At the Huffman place. Above the Wabash railroad. Less than the break of '76. The break of '81 was filled during the fall. And the break at the Hannibal place in the fall of '81. The people went on to raise crops in '81. There was another break Oct. 19th. Water 19-9. On the 21st it broke a little above the cut-off. 20-5. Oct. 28th, at the Stillwell place, 20-11. The breaks did not represent the whole damage to the lands. Not half of it. My recollection is that a special assessment was made in '80 and '81 to repair the levee. An annual assessment of 33 1-3. And from this time the breaks of the levee were repaired. This was under the new organization.

The break created such a hole or channel in the levee that there was often twenty and as high as forty feet in the hole. When the river had subsided we would go and fill these up. The levee was all repaired on the outside and sometimes on the inside. Cannot speak intelligently how many feet.

The next break was 1888. There was a small break in '82. In the lower end. By Clarksville. Not very important. The gauge was 18-21. There is a difference between the Hanni-
87 *a* bal and other gauges. They were taken at different times.

mony of
. W. Clark

There is a difference of 19 inches between Hannibal and Louisiana. I reckon from the Hannibal gauge. The different gauges are as follows:

In 1883 the water was 17-6.
In 1884 the water was 14-9.
In 1885 the water was 12-10.
In 1889 the water was 12.
In 1886, March 27, the water was 13-7.
In 1886, May 9, the water was 17.
In 1886, March 18, the water was 3.
In 1886, March 4, the water was 11-10.
In 1886, April 6, the water was 12-9.
In 1886, May 12, the water was 18.
In 1886, May 17, the water was 21-11.
And the levee gave way at Murphy's bay.

The gauge at Hannibal was higher than the '51 water at that time. Had run over the levee at the Stillwell place below the Wabash. So if the levee had been constructed in the first place in the manner they ought to have constructed it, it would have still run through.

At that time a good deal of work had been done by the new organization. Think the embankment had been raised probably three inches. Destruction of crops in '88 was greater than either of the others. Wheat would have been good but for the water. It was the 17th of May. Been no break since then. In all this time, from the break of '76 up to and including the present, whatever work has been done has been done by the land owners, except an appropriation of between eleven and fifteen hundred dollars.

The contract of Skelsey, Fuller & Pierce and the specifica-
88 *a* tions upon which the contract was made required that there should be a ditch 4 feet in width and 4 feet in depth in the center of the levee. Generally that ditch was not made. Such a ditch would be an important feature in the levee.

So far as I had contract for, the ground was grubbed. It was grubbed for the distance of 10 or 15 feet toward the center of the levee. And from the outside. From the slopes towards the center of the levee. Ten to 15 feet. As far as my work went. They were to dig out all grubs and present clean dirt. Nothing was to be left. I have seen stumps standing in the levee. Below the

Wabash road, in May, 1888. Some places the levee would be left, and the surface of the ground just before the levee was placed on it was exposed, and the stumps were standing there.

The plan of construction embraced these features to provide for an escape, not only at the head of the Sny, but also at its mouth. The order was to provide a canal or a new Sny should be made near its mouth through into a series of lakes called King's Lakes. They should all be connected by a canal so that when the water was low all the water could be taken into the lakes. That little ditch was to carry the creek water. Cannot name all the creeks. Fall Creek, Bacon Creek, Keiser Creek, Craney Creek and Hatley Creek.

The Sny is their natural outlet. To dam up the mouth of the Sny would overflow the canal, of course. Canal 12 to 14 feet wide and 2 feet deep, should think. Not sufficient to carry that water off. It overflowed that country for several years. Washed out some. I owned land on the Bottom at that time. Was buy-
89 *a* ing and selling and handling land. It increased to '76. Great percentage. It was worth at one time $12 more an acre. After the break the lands, as a rule, were valueless. Good improvements had been put upon it, but there was no market value for it. That is from '76 up. Between these periods everything was booming. We had no idea that the levee was going to break and we put improvements on it. The land was proven to be absolutely valueless. The value rested upon the drainage of the levee. The original plan was that the levee should be drained.

Since 1876 there has been expended the government appropriation of $50,000, and the land owners expended from $400,000 to $450,000. It cannot be figured closely.

Cross-Examination.

Was familiar with the Sny Bottom before these movements for the levee. Purchased the land in '70. General value at that time from $1 to $12 per acre. Some lands were valueless. Large percentage. The better lands were $12 an acre as I recollect. Along the road from Hannibal there were places where work was carried on in '70, and along the bluff the increase in crops was so great that there was probably ten times as much in '76 as in '72. I estimate the destruction of the break of '76 $1,000,000. It was greater than that.

opy of
N. Clark.

I explained the law over the district at the points named. Told them what it would cost to do the work. My impression is I stated to the people that $5.00 an acre would be necessary for protection, and think that was the belief of the land owners. Gave my information from the engineer, E. L. Corthell. It was his first work. He was an assistant of C. Mason's. I was em-
90 *a* ployed by the Commissioners to secure the right of way. Reported to them. There were other superintendents employed. I was active getting up petitions for the work. That was the main object of these meetings. I solicited the company of Mr. Chamberlain. There was no attempt at secretion.

At the time the work was done I was not satisfied. Had noticed that the levee would break. Put in my crop on the faith in the protection started by the levee. So far as I know, every land owner did the same. From '74 to '76 there was great confidence in this protection. After the break in '76 the Commissioners appointed by the County Court took no steps to protect the levee. Do not know if they were ever asked. The breaks were reported to everybody. No notice to the Commissionrs as I know of.

At these meetings read the law to them. Had a copy with me. Answered questions. Cannot recollect date of first meeting. They were held before September, '71.

Do not know if the law had been published.

The land owners had done something before March, '77. From that time up to '80, there was little organization. About that time the land owners of the upper land said they would give 50 cents an acre. The people attempted to stop the breaks.

That was the condition until the trust arrangement. I positively say that the levee was never completed. There was not money enough. It would have taken three times as much to have built a substantial and absolutely safe levee.

To have dug this canal would have required from $2,000 to
91 *a* $3,000. It is not a safe levee now. Water came through there last year. A hole a good deal larger than a stovepipe came through under the levee. Crop of '88 was lost. The crops since have been saved.

Re-Direct Examination by Col. Matthews.

Subsequent to '88 the crops had been light. We have not had a full crop since that time. The last two years nearly failures. In the vicinity of Hulls, water has entirely destroyed the crops. Very difficult to stop it. Testimony Chas. N. C

My estimate of a million dollars was all personal property that was actually lost. Increase in population since the construction of the levee would be very small. Pleasant Hill has had a slight growth occasioned by the railroad making a station there. The next town, Atlas, has no railroad and no growth. Rockport is not as much of a town by 25 per cent. as it was before the construction of the levee. It was much more of a town then than now. No prosperity in New Canton and Kinderhook. Hulls station has sprung up since the levee was built. The railroad crosses there. About 100 people there now.

Levee 52 miles long. No new towns. No highway on the river side. For fifty-two miles there is no postoffice or town that has been built up except East Hannibal. Cincinnati, the next town, has two or three residences, not as much as before. There is a thoroughfare out to New Canton. There is a house or two there. Pike is next; a small place where a store is run a few months at a time. Clarksville is nothing.

R. M. MURRAY.

Live at Kinderhook. On a straight line from East Hannibal and east on the river. Am acquainted with C. N. Clark. Testimony of R. M. Murra

92 *a*

Do not remember the meeting he speaks of at Kinderhook. Did not own any land at that time that was subject to overflow, and took no interest in the meeting. Think Mr. Clark brought me the petition to sign. Think Mr. Spencer was with him. Talked over the provisions of the law. The proposition was to build a levee along the river to keep it from flooding the land. It was to be built by a tax upon the land. It was to be kept in repair by the same way. By taxation. These propositions were discussed when I signed the petition. Was appointed Levee Commissioner at the February term of the County Court, 1880. Have had some superintendency in such matters. The levee would need repairing every year. A. Stebbins and J. O. Barnard were appointed

ny of Murray. Commissioners with me. Our first official act was to go upon the old levee. Think it was early in March, 1880. We went up to the end of the levee in Adams county and went through the entire length of the levee. We were appointed under the new law. At that time no assessment had been made for repairs under the new organization. Were viewing the land to see what it needed. The Commissioners concluded to make it two or three feet higher and the base to correspond with that. That is what we decided ought to be done. It lacked from 2 to 3 feet of being to '51 water. We intended to put it to the '51 water. From 2 to 3 feet. Then we found that the levee was small and narrow in places. And it was badly washed by the high waters. It had been used for roads and paths across it, and farther down it had been dug away or 93 *a* something. All these things had been leveled up. We concluded to levy $100,000, to be collected in three years in three annual installments, to put the levee in repair. In addition to that, and at the same time, there was an assessment made of 20 cents an acre, which would make over $20,000, which should be collected annually to keep the levee in repair. This should not be collected until we had spent the $100,000, and it did begin and is running yet, I presume. We had our first annual tax. We placed them in the hands of the collectors in '83 when I went out. There was a jury called and appointed by the County Court who went over the land and made a distribution. Lands not all assessed alike. Done by the jury. We commenced collecting the taxes. This was early in the spring. The river commenced rising. On the 30th day of June the levee went all to pieces. Up to that time no dirt had been put on. It broke in four places. In the railroad bridge at East Hannibal; at the cut off; the James break below Hannibal at Murphy's bay.

In '80 I was across the Bottom in all directions. Everything was in wheat. As fine a prospect as I ever saw. Corn was splendid. Looking fine the first of June. Sixty or 65 per cent. of the district was in cultivation. Sixty thousand acres in cultivation. Would think that the wheat on the levee would yield from 60 to 65 bushels to the acre. About $1.00 a bushel. Different parties estimated the loss from two to three million dollars.

After the water subsided the jury was over the ground.

(Verdict of the jury that made the assessment in 1880 offered in evidence.)

Assessment was returned and affirmed by the Court in the
94 *a* June term of 1880. We commenced collecting in the fall and commenced work on the levee. Made contracts with parties to fill up these breaks. The upper break was in the railroad at East Hannibal. We put that right back in the line of the levee. At the big cut-off we filled that by a loop on the land side. Where the levee was washed out, there I noticed the little log. The little break that occurred at East Hannibal, that was full of logs. That was filled up that winter.

The next break was in the spring of '81. At Fish slough two miles above Hannibal, that was filled up. The next break was in October, '81. The little break destroyed the wheat crop. The break in the fall destroyed the corn crop. All lost, every bit of it, nearly so. The breaks in the fall of '81 were at the back wood bend below the Cincinnati landing. Then there was a break about eight miles below Hannibal, called the James break. Then this great break just above the bridge, and then it washed out below this break at Cincinnati. And another one some five miles below there at the lower end of King's lakes. And another one at Bay Island. There were other places that the water seemed to cut through. The entire assessments until I went out were expended in filling breaks. Not able to put anything on the levee to keep it up and prevent breaks. The breaks were filled in the winter and spring of '80 and '81.

In building the loop we made about 1,700 feet of new levee. Where there was a break it always made a dip. You could build a thousand feet of new levee as cheap as you could three hundred feet after it was done. So we always built around it. I went out
May 1, 1883. Did not repair the levee on the lower end. I
95 *a* was out of office before we could get money to do it. At the big break, right opposite Clarksville, where the levee broke at the cut-off in '80, it did not look as if it had ever been cleared. It did not look as if it had ever been grubbed. A levee in that condition was not a protective levee. Could not put a protective levee on that sort of a base. The levee that gave us the most trouble was where they had used the dirt from the land side. They started a borrow pit 30 or 40 feet from the levee and dug there as long as the team could pull it out. When high water came here was the trouble. It would pour out here to the ground. The ground would crack and it would seep out and keep going out in the borrow pit. That was unquestionably an error. After they began talking about building a levee there was a move in

ny of Murray. lands. A speculative demand for it. In '76 it kind of killed the speculators off, and you could not sell the land. Since this new organization the lands have improved a great deal. The value depends upon the levee.

I think it is the rule that the men who have farmed the lands are getting poorer every year. Do not think the building of the levee has helped the towns. The building of railroads has helped them some.

Cross-Examination by Senator Palmer.

My land is in Kinderhook. In sections 14 and 24. Have none in the levee district. Signed the original paper. No other. After appointment as Commissioner made a tour of the levee. The breaks of '76 had been filled up. Thought $100,000 would put it in good order, with the $20,000 to keep it in repair. Were disappointed in that. Spent all the money and never com-
96 *a* pleted it. Signed the original paper. At the suggestion of Clark & Chamberlain. They explained everything. Expected the land would be assessed for the repayment of the money. Examined levee in March, 1880. The jury were making out the books when the levee gave way. The obstructions were on the riverside mostly.

A. V. WILLS.

ny of V. Wills. Forty-three years old. Owned 750 acres in the Sny Bottom. Have owned land more or less since the fall of '72. Presume I signed the petition of '80. Have been farming my lands. Am acquainted with the Sny levee. Knew the old and new levees. Was appointed Commissioner in '83, after Mr. Murray went out, and have been a Commissioner constantly up to September, this year. Martin Hardy and Henry C. Cupp were Commissioners with me. Went into office in June, '83. There were breaks at the lower end. We filled them up in the winter of '85 and '86. From '80 and '81 they had been left open because the district had no money to fill them up. Did not go to the lower end because we had no money. First repaired the levee on the riverside. There must have been ten miles of that part that was cut in by the waves until it would stand perpendicular from a third to one-half through the levee. This was at the upper end, above Hannibal. Then below Hannibal, opposite Mr. Spencer's farm. Then opposite Cincinnati landing. Then to Sny landing. There were two causes for this: One, too near the river; the other, too short a slope.

Testimony of A. V. Wills.

It was originally intended that the construction should have
97*a* 2 to 3 slope on the outside and 2 to 1 on the inside. There were many places that a man could scarcely ride on top of the levee on horseback. The whole entire levee was from 1 to 3 feet below grade at '51 water. That is what we worked to. Our engineers worked to the grade of '51. The upper end of the levee was in a little better condition than the lower end. It took up to the winter of '87 and '88 to get a wave action. We found a large growth of timber. A detriment to a levee. They grow thick on the levee. Filled it with roots, heavy rains come, the roots decay and leave crevices and cut it out. We took these off. Did very little to build it up. We had not the money. In '88 I think there were 29 breaks. The first break the water was 19 feet Hannibal gauge. Up to the time of the break in '88 there had been no considerable work done on the levee under the new organization, but it remained as it came from the deed of trust of '76. The reason was the money was not there. There was nothing saved in '88; the loss was immense. It certainly could not have been less than a million of dollars. The government filled up the breaks of '88. We got crops in '90 and '91. Very little in '92 and '93. The washes are a damage to the land in addition to the crops. We were entering upon a system of increasing the height of the levee. It was not a protective levee. We advised the district to commence another assessment. We got that in on the levee in '88 and '90; put the annual assessments in too. Made it 3 feet above the grade of '51. Increased the base 2 to 1, and on the riverside 3 to 1, in all instances. We made the base no less than 125 feet, built mostly of sand. We had a high water test in '92; the water was then 9 inches. At Sykes' landing it ran over the land for two or three miles. There were a good many places of
that kind. We took plank and built a box and filled that box
98*a* with dirt and filled it with sand. If we had not done that, the water would have been from 1 inch to 12 inches deep. That is not a protective levee. At Hannibal it lacked ½ inch of being up to '51. From Louisiana it lacked three feet. If the water had not broken through it would have run over nine-tenths of the levee. Everything was done to keep it. A large force of land owners worked for three days and nights trying to hold it continuously, but it did go over. I do not think we had raised the levee up to the Corthell grade. In '92 it did run over for four miles. It did not run over in '88, but it did in '92. It lacked quite a good deal of being as high as in '88, and I do not believe that the water at Hannibal was ever nearer than 2 feet. Taking the gauge there the water was ½ inch of the high-water mark. Think it was the raising of the water. Think the river is too narrow there. Water

timony of A. V. Wills.

was within 2 inches of the gauge of '81 and ran over the bridge. After the break of '88 we went to work to raise the grade. We raised it uniformly 3 feet. Commenced at the Wabash railroad. It ought to be that much or more. The base should be 3 to 1 on the river side and 2 to 1 on the land side. In alluvial soil, 4 to 1 on the river side and 3 to 1 on the land side. In sandy material we did put up to grade of 5 to 1 on both sides. We found it was not heavy enough. My impression is that they are making it 15 to 1. There are sandy places where the water carries it away, and the only way we could hold the levee was by bags of sand. We did it that way. By that kind of work we were able to hold the levee. From the time I went in to the time I went out we must have put in $300,000. There were the ten annuals and the $100,000 special that we put in, besides some private donations in and about 99 *a* Hannibal. The money put in by the government would be $50,000 more. I think it will take not less than $200,000 or $250,000 to make this a protective levee. It must have annual attention. Trees and brush kept off and watched; must have attention all the time. I was farming on the Bottom in '80. Wheat and corn, and from that time. My loss in '88 very large. In '76 large. From $7,000 to $10,000 in '80. The wheat was in the shock and the corn laid by. There was a great loss. The loss was 75 per cent., if not more. For thirty years I have known every cow path on the land, and from this knowledge I estimate that 75 per cent. was in crops that year. That was the largest loss the land owners had. All the wheat was in the shock. The corn was laid by and looked fine. Loss must have been $2,000,000. Think the loss of '76 was $1,000,000 or more. In '81 our corn crop was lost, but that was not so great. After the break in '80 we did not put in any wheat scarcely, and I presume that 50 per cent. of the land that was in cultivation in '80 was not in cultivation in '81. I could not rent my farm. Nobody could. Nobody had any confidence in the levee. The loss in '88 was a big one; $1,000,000 or more. I have been farming there ever since the levee started. I am well acquainted; and if there is a man down there that has made money I do not know it. I think all have lost money instead of making money. We discussed the provisions of the law in order to keep the levee up. The law enabled us to maintain the levee. My friends and I went into it with the understanding that it would benefit the levee and maintain it. My theory is that nearly all the breaks were caused by borrowpits. On the river side, about one-third way up the 100 *a* slope, we dug a ditch as deep as we could and we run that ditch down from 6 to 10 feet. In some places it was that rotten material that we could not get at without letting the men

get down and we would import good material in and tramp it in as we went ahead with it, and then we covered over the ditch; faced the ditch with good material so as to keep the water down. In that kind of soil I considered that necessary. I have seen places where the levee washed out and have never seen anything of that kind. Have seen a good many stumps and logs. That is not the way to build a levee. Testimony A. V.

Cross-Examination by Senator Palmer.

I own about 700 acres in the district. Succeeded my father. Bought and inherited. The lands that I first got were in sections 13, 14 and 15, 6-6. Prior to the building of the levee the best lands were worth $15 an acre. And where they could not keep the water off, $2 or $3 an acre.

After the levee was built the cheap lands went up some. After the breaks they were not worth more than when the levee was first built. You could go and buy the lands at whatever you offered for them. The value depended upon whether the levee was successful or not. Between the planning of the levee and the first break, in '76, the lands advanced very rapidly. The average advance was from $3 to $10 an acre.

The break in '76 depressed the value. From time to time as the breaks have occurred the value has beeen depressed. Do not know what the average value now is. Sold sections 13 and 14.

Now own west half of 18 and the northwest of 19, 5-6. I
101 *a* signed some of the deeds of trust. Think I signed the petition for the drainage district in '80. Was acquainted with the levee before I became Commissioner. There were breaks in it in the fall of '80 and in the summer of '80, and in the spring and summer of '81. When I took charge in '83, there were some breaks below Clarksville from the overflow in '81. In '80 to have made the kind of levee I think ought to be, it would take $200,000 or $300,000. Was acquainted with the levee when the deeds of trust were made in '77. Think $300,000 in cash would have made a good levee in '80. In '88 there was a disastrous break. If we had been furnished with money before that, I judge it would not have happened. Our engineer established the Corthell gauge or grade line. Ascertained it from the bench lines on the trees.

The levee was a great deal too low. I think they never got it up to the high water mark of '51. I think the cause of the

Testimony of A. V. Wills.

breaks was that it was never properly constructed. In order to make dirt form, the surface must be broken up. That I am certain was never done. It is necessary to plow and break it up; then there should be a ditch to cut off the roads or mole holes. If you have rode over low ground you have had your horses feet sink in them. By plowing and digging you tearm them out; and then you fill them and stop them, and it stops them for all time. As you know, they never come back. A muskrat never comes back. The stumps and logs should be removed, and where the sandy material was; there should have been no dirt removed from the land side. The levee should have been constructed where they could get enough dirt from the river side.

The levee must have base enough and height enough, which
102 *a* depends upon the kind of material used. Fine sand will run with the levee. The base and height both depend upon the condition of the soil. With all these things done it would give a safe levee. I discovered in '83 that those differences had not been reported. I knew it before '83. I discovered them in '76. Everybody in the levee district knew that these breaks were there. It was a notorious fact. Did not put the levee in perfect condition in '83 because we did not have the money. The loss would have been less than to let it go.

Re-Direct Examination by Col. Matthews.

These breaks have made the people so poor that they could not meet their assessments. They have to work their taxes out. They have little farms and have to live. They have to leave their stock and families to go and camp out on the levee and pay their levee assessments. As a rule they have not made enough the last two years off their farms to pay their taxes on the levee.

SAMUEL M. SPENCER.

Testimony of Samuel M. Spencer.

Have lived 54 years at Payson. Know the Sny Levee Bottom. Have been examined before. Two years ago, here. At the time this levee project was being discussed was a land owner in the Bottom. Owned nearly 2,000 acres. Below the Wabash railroad. Been farming that land ever since. Some years have made and some years I have not. During that whole time I have not made as much as I have lost. Raised a big wheat crop in '91. About 1,000 acres. Over 20,000 bushels. Next year about half. In '93 about 3,000. Pretty good chicken feed. In '83 nothing. In '87 guess it was enough to live on. In '86 we lived. Was in

better circumstances before the levee than since. Getting
103 *a* poorer most all the time. I have fared as well as others.
The men that have farms and have farmed the land, if they had anything to lose they lost it. Worked on the levee in the fall of '76 filling up breaks. Commissioners at that time were Jones, Westlake and Wheelock. Authorized me to take charge in '77, and in '80 worked on the deed of trust. Filling the upper break of '76; the Hannibal break in '77. Was at the meeting at my barn. Clark was there. Think Chamberlain was not. Joseph Elliott, Messiah Thompson and Mr. Rouse. Do not remember who all. We understood the nature of it. It was explained that under the law they proposed to construct a levee and maintain a levee. Understanding these two things that the law contained two propositions: First, the construction of the levee; second, the maintenance of the levee. Both by the assessments against the lands benefited. Those propositions were discussed and talked over. Understanding them that way we were induced to go in. It is absolutely necessary to have some means to keep a levee in repair. Think I was at New Canton and Brewster; same talk as at the barn. We were working for the maintenance of the levee. Seven miles from the head of the levee to the Wabash road. Commences two miles above the mouth of the Sny. From the north end of the levee down to the Wabash, at that time there lived Brookner, Mr. Jones, Edwards and Fairfield. Continuing on down, the next man was King; the next Rouse. Just south of me, Aldrich; between Aldrich and the cut-off, Smith. Hannibal was 7,000. No way of getting across the cut-off besides boats. When the levee would break most people would be driven out.

The first water proved that the levee was not protective.
104 *a* There was not half enough of it—about one-third large enough. In filling these breaks we had every chance to see; we saw a few logs left. Southern rule is to plow the land before we make a levee. In my judgment a ditch is necessary in the center of the levee. The best engineers say so. And ought to be grubbed and the roots cut off. A great mistake to take dirt from the land side. With the holes as they were in '80 it would take about $300,000 to make a good levee. But I never expect to see a perfectly safe levee in my life. A great portion of the money that was spent was spent in filling breaks. I suppose there might have been a better line struck out. Levee should be given some room. Have heard the witnesses talk on the subject of the loss. As near as I can say, that is my judgment.

Testimony of [illegible] M. Spencer.

Cross-Examination by Senator Palmer.

The success of the farmers depended on the water. We are disappointed in the Bottom more than on the hills. We have the benefit on the water from the hills as well as the levee. No place for the water to go. Tile has been tried, but failed.

Testimony of J. Brannell.

J. W. BRANNELL.

Lived in the Sny Bottom since 1835, in the overflow district. A little northwest of New Canton. Was living there when the levee was constructed. Well acquainted with the line of the levee. Have worked on it. Knew Skelsey, Fuller and Pierce, and Mr. Corthell and the Commissioners. Was acquainted with all of them. Going down from Aldrich's place at Cincinnati there is a small settlement. There used to be quite a town before the levee was built. Now one warehouse and a road to the hills. 105 *a* At Sykes' landing was the next road to the hills. Louisiana the next. No roads and public highways running north up and down the river. A Quincy and Alton road along the river. To-day there is one to Hannibal that we travel. My land subject to overflow. Been in cultivation 50 years. Had it all before the levee was built. Paid $3,000 for 180 acres without anything on it. Paid $2,300 for the 40 near my house and $1,600 for the one that lays east; that was before the levee was constructed. Section 20, 5-6. Have no recollection of signing a petition. Heard Mr. Clark several times. Was at the meeting but never signed. Heard the arguments; they claimed they had a law passed through the legislature that they could go ahead to build a levee to protect us. We could go ahead and maintain it. It would not cost over $5.00 an acre. It would be light on us. It looked as if it would be reasonable to go ahead and construct one. According to their talk it would be higher than '51, and to have a slope from 2 and 3 to 1 on the river side and 2 to 1 on the land side. I did not sign the petition. If I had to buy over again would not give the same money for my land to-day. Do not think it is worth as much, the way they want me to pay taxes on it. Do not think any land which the water was over, that is taxed, is worth as much as it was when the levee was constructed. There has never been any water any higher than in '51. When it was first constructed I suppose land sold for some more. After the water came against the levee, I think there could have been land bought for 75 cents or $1.00 an acre—after the break of '76. Increase in value is dependent upon the ultimate success of the levee. The salable

value depended on the value of the levee. I made a good
106 *a* deal more before than since. Whenever the water was high enough to go on my farm the levee always broke. Since the levee was constructed farms have been getting poorer right along. Do not think the levee has been of any particular benefit to those farming on the Bottom. Was along the levee three or four times a week. Noticed how it was constructed. Have built levee. Had some experience. There should be a ditch in the center of the levee; all the logs and stumps and such like from the base of the levee should be grubbed and the ground plowed and the bottom of the levee should be fixed well. I never saw any ditch along the cut-off to Louisiana in the back woods bend. This is a dangerous place, where a ditch ought to be cut. I never saw any ditch cut. There were places where there was no grubbing. Saw them start. They were covering up the brush. It was not even plowed. The brush was not cut off at all. It was not grubbed. I have seen stumps and all that in the breaks. I thought the borrowpits would ruin the levee and it has proved to be that that has been the trouble. The levee was not big enough. It was not wide enough. The base was not wide enough to give it the slope and height it ought to have had. The slope on the inside was not as great as we understood the specifications called for. As the water came up against it, it would slide off into these borrowpits. It was too low and too narrow and in the deep cuts it was too steep. There have been frequent breaks. A good portion of it was constructed largely of sand. All of the breaks so far as I know have been in the old levee, and not in the levee constructed by the new organization. Helped fill the breaks. The '76 break was filled
straight with the old levee. Others made a circle. Noticed
107 *a* a stump in the break.

Cross-Examination by Senator Palmer.

Owned some in 20 and some in 30. Think I paid the first assessment. Think it was $8.40. Live in section 20. Bought it in '64 or '65. Lived there since except five years in California. Talked to Mr. Clark about the construction of the levee. Understood that the levee would be built by assessments on lands according to benefits. Understood that the money would be borrowed. Paid some attention to the manner of its construction. Corthell was superintending. I never saw a ditch made. Ditch would have been a great advantage. Observed that they were borrowing the levee from the inside. Some places the whole construction was from that side. Told the engineer that was not the proper thing to do. Talked with Mr. Corthell. Worked with dirt since I

mony of Brannell.

was big enough. Had considerable experience. Made a great many dams. Told him I thought it was ruining the whole thing by taking dirt from the inside. He seemed to think it was all right. I have done about $2,000 worth of work in repairing the levee. Likely three miles in all. At the mouth of King's lake I rebuilt 1,600 feet, below Backwoods' bend. We built 4-foot ditch. We put black dirt in it. We had a solid bottom to commence. In our country no break that has been repaired has broken again. In my judgment the breaks resulted from taking dirt from the inside. It has been broken from the water boiling up in the borrowpits. There are borrowpits 10 feet deep. Some not over 5, some 3. Dirt was hauled out by teams. Sometimes they dug to water and sometimes they didn't. There was an increase from the time the levee was supposed to be constructed. Crops 108 *a* were sold and lands. Some of the low land was pretty high.

The land was most salable before the break in '76. The breaks in '76 destroyed the value again. Only one broke in '76. Helped repair the levee. Did not get a cent for it. About four miles below Cincinnati. I discovered before that the levee was not secure. I always doubted it. No systematic attempt made to repair the levee until this new organization. Some arrangement in '77 to raise money—by deed of trust. Think I signed that deed. Did not sign the first petition nor the second. Farming in the Bottom has not been a success. Ground is very rich. If protected from the water would be desirable. A good deal of it. The drainage is a big drawback. The water is all over the land—no outlet. My land had value before the levee was constructed. All the land was valuable for grazing. The lower lands were used almost exclusively for that purpose. Of all those who have gone there and bought farms, do not know of any who have made money. In our Bottom think every man has lost money. They took the dirt largely from the inside.

E. PETTY.

mony of tty.

Have lived at Rockport sixty-one years. Know the Sny levee. Long as I remember. Own southwest of 20, 6-5 northeast of 15, 6-6, southeast of 34, 5-6. All in cultivation. Part in 20 has been cultivated since 1860. The other about '72 or '73. In '66 or '67 I bought the southwest of 20 for a thousand dollars. Before the levee was built or talked about it. It was subject to overflow from the river. The Sny runs through it. Been farming these lands ever since. Paid $2.50 per acre for the lands in 66.

Think I signed original petition. Attended the meeting at 109 *a* Rockport. Remember James Rooker, Shaw, Benjamin. Do

not remember others. The act was read by Clark. It was explained that it was proposed to construct and maintain a levee by taxes. That was discussed by all of us. It was to be $5.00 or $5.50 an acre to have the levee built and maintained. With that understanding I signed the petition and went into the organization. That influenced the others. Means of repairing and maintaining the levee would be absolutely necesary. That proposition was discussed. Think it was in August. They intended to make a protective levee of '51 high water. The levee runs right across the corner 6-6 on my land. Quit work on the levee in the spring of '75 I think. Knew the contractors. Butchered on the levee for them. It is eight or ten miles from the cut-off to Gilgal Prairie. Butchered for them while they were constructing that piece of the levee. Was up and down the levee. Noticed the construction. Do not recollect seeing any grubbing or plowing done. Went over the ground from Sykes landing and back. As far as Backwoods bend. The levee was on my left going up and on my right coming down. Nine or ten miles. In all that space never saw any grubbing done. Do not recollect of seeing them plow. Went up and down the levee two or three times a week from January to July, '73. If there had been a ditch 4 feet wide and 4 feet deep, I would have seen it. Some of the borrowpits were deep. They did not go deeper because of the water. Think the rise of the water could be noticed by the rise or fall of the water in these borrowpits. When they came to water they struck sugar sand. That system was carried on from the heart of the prairie as far up as Cincinnati. It has proved to be disastrous to the levee.

110*a* It has become necessary to fill up the borrowpits on the inside. I helped fill up the break of '76. Run right straight across. Took sand and dirt and put in. The opening was 300 feet. Water over 20 feet. That work is still there. Raised it 10 or 12 feet above the level of the surface. Thirty or 40 feet wide at the base, and we put 20 feet on it. On Backwoods bend levee was 6 to 10 feet high. High average. Power of work done there. It was in the old levee where the breaks have occurred. Not where the levee had been repaired.

In repairing the Corthell levee it is absolutely necesary to fill up those borrowpits and dig a ditch. And it has become necessary to make it heavier—three times heavier. No doubt about it being three times heavier. The trouble with the levee was, it was not big enough and the ditch was on the inside. Water ran over it and through it. They did not build it to the high water mark. Lacked about 2 feet. I remember the water of '51 and

mony of ...

'58. From '44 up. Never has been up to the water mark of '51. Never found anybody who did think it was up to that gauge. Think the levee should be about 2 feet higher than '51. The slope should be five to one on the outside and three to one on the inside. Think that would hold it. The Backwoods bend is considered the most dangerous part. It has broke four times. They never gave us a protective levee. It would not have broke if they had.

Most of the prairie had been fenced in before the levee was built. Some farms. Some have been farming ever since. Do not know any that have made anything. Getting poorer. Do not think my lands could be sold for as much as they cost me, 111 *a* all on account of the water. What is true of me is true of my neighbors.

Cross-Examination by Senator Palmer.

Born and raised in that neighborhood. About two miles from Atlas. The levee had been the talk in the neighborhood for years. Mr. Clark was the first one I heard. Leonard came in several years ago and talked it up. Clark explained the law. Believe he stated that the levee was to be built by issuing bonds. That the owners were to be asessed—that the assessments would be made by a jury. I signed the first petition. Knew the commissioners. Was there butchering. Had occasion to go up and down the levee. Do not think there was any plowing. Did not see any. Did not see this ditch. My establishment was at Sykes landing. Two hundred feet from the line of the levee. Great many new people came in to hunt up titles while the levee was in progress. Increase of population in township would be a couple of hundred. These men made houses and farms. Advance in land from $2 to $5. Average in my neighborhood before the levee was built not over $2 an acre. Average up to the first break in the levee in '76 would come up to $5 an acre. Fine crops raised during '75 and '76. Took part in repairs of '76. Neighbors also. We made that substantial, and it has never broken since. We raised money in Pittsfield. Mr. Dodds superintending. We did it with wagons and men hauling dirt. Made the base 20 feet wide. Got the dirt out of the banks around the hill. Lost several crops since. Raised some good crops. Have nothing on account of breaks. Most of the loss has been caused by overflows.

Am a defendant in this suit.

112 *a* Re-Direct Examination by Matthews.

In the old '76 break there was a stump on the south bank, and down there at the Jim Reiger place where it broke off at the top of the levee there were six or seven stumps and several smaller ones standing there. Three miles below Sykes landing. I seen a stump in the '81 break. We are close to the '76 break in 5-6. About 200 yards from the '76. That break was 400 or 500 feet wide. I saw the stump come out with it.

Testimony E. P

Re-Cross-Examination by Senator Palmer.

It might be true that some of these breaks were caused by the water on the inside. Think I paid the first assessment and maybe the second. Understood the plan to be to issue the bonds. Do not know that the bonds were issued to Skelsey, Fuller & Pierce at 90c on the dollar.

EDWARD PRINCE.

Examined by A. C. Matthews.

Testimony Edward Pri

Reside in Quincy, Ill. Have lived there since the fall of 1852, with some interruptions. Studied law. Became a member of the bar in 1852. During the war became civil engineer. After the war studied the profession carefully. In 1876 went to Holland and examined the Holland levees and bridges. Studied the subject of dykes and dams and what is called warping. Raising land by inundation. Paid particular attention to such things. Went in as Commissioner in 1880 for about a year. Was consulting engineer of the present work. Am acquainted with the Sny levee. First heard about it when the subject was being agitated. Met the parties who were making the preliminary survey locating the high-water line. Mr. Corthell, Richardson, assistant engineer; Parkhurst, draftsman, and some other assistants. Talked 113 *a* with them about it. Work commenced in '72. Continued until '75. Observed that in a good many places they did not do any grubbing, and in the winter time plowing was abandoned on account of the freeze, so that there would be no possibility of any union between the levee and the ground. I never saw any sign of a ditch, but there might have been at the upper end. The break of '76 would have been a good place to have seen it. Cross

Testimony of Edward Prince.

section was exposed. Levee dirt washed out. If there had been a muck ditch there at that time cross section would have shown it. I did look there. I could not see anything. Might have been a muck ditch at some other point. Saw levee every month or two in its construction. There were defects of construction, I think. First thing that alarmed me was the location of the levee. Starts at a good place. About a mile from the starting point it runs too close to Sand Slough. There is a sand pond there. The location was possibly about as good as you could have it. I don't suppose there's any fault to be found with that. Just at the upper end of the land owned by Mr. Stillwell. Perhaps it is called Sand Slough. I would have never crossed that. I think it is disastrous to cross that slough. From Thatcher's landing they hitch on to the railroad. No reference at all to the levee construction. That is the Wabash railroad. About two miles of that, and the railroad fill had water ways through the levee dams, and they put in logs and debris of all kinds to make a dam. It was not water tight. That was hitched onto, and I was a great deal alarmed about that; and I think subsequent events have proved the reasonableness of the alarm. Because it washed away. The levee was nearer the river by the distance of the Sand Slough than the present location. That was the location of the Wabash railroad, which runs, I think, easterly for about two miles. It would have been a good deal less of expense to have gone on the east side of Sand Slough and much more secure. It would have given probably 2,000 feet more 114 *a* water way at Hannibal. The water way was very badly needed.

The bridge at Hannibal had just been constructed by Col. Mason, a next door neighbor of mine in Quincy, and we talked a good deal about the filling up. There is a fill made to 200 or 300 feet to first abutment pier. About 1,300 feet of water way to the river. Assuming that the bed of the river remained the same, of course, the water would be raised. There was some talk of taking out that fill of dirt and putting in an iron trestle, but it was never done, and the 5 or 6 miles of water that used to flow during high water was forced through this 1,300 feet. The bottom of the piers were riprapped and stones put in about them. The piles and the grillage had to be protected with stone, or else the pier would go down. And they did that, and of course the river would be dammed up, and that would raise the plane of the river and endanger the levee. I think that was a very bad location. The work was made without leaving water way for the river, necessitating large expenditures of money in filling breaks which have occurred since.

After you leave the Wabash, about 2 miles from Hannibal, you pass Rockport and come to the river below Sand Slough. The banks are generally higher than the interior land. For the reason that the matter in suspension is dropped when the flow decreases. Mr. Corthell selected in many places the higher bank in preference to getting away from the water courses, which I think was a mistake.

At Cincinnati the encroachments of the river were threatening that location. Now I suppose it must be very near the levee.

That was a bad location, I think.

115 *a* Along Murphy's bay for miles it runs right along the bank of that stream. There is no possibility of getting the dirt from the outside. If he had located it in and taken a little more dirt it would have been much more safe. That is my general idea about the location.

On down below Sykes' landing there is another railroad running through Quincy to Louisiana. When the location got near that dump, why they went and hitched on to that; that runs right into the river and reduces the area of the water way about 1,700 feet. That would leave too little water way for the river. It would scour out. No doubt of that in sand the bridge scoured out. Scoured out 60 feet. Two spans of the bridge went down. This was at Louisiana. The railroad could take care of itself but possibly the land owners could not. That was certainly a bad location. I would have located it half a mile further away at least, even if it took more dirt. It was a penny wise and pound foolish policy. Going further down towards Murphy' bay it seemed to me it was too close to the river, but I was not familiar with that portion, and when you get on further down, about Clarksville, it is too close to the river. Though I do not think that location has to be criticized as much as the locations at Hannibal, Murphy's bay and Louisiana. Those were especially disastrous. The location should have been farther from the river and more water way allowed for the river to flow in. I saw it a few times and I saw the method of construction. I made some statement about the ditch. I never saw anything of it. It might have been there. Where I have had opportunity to see it, if it had been there, it was not there nor did I see any sign of it. As to the plowing, think whenever there was land they could plow, and the weather was so they could plow it, they did plow it and undertook to make a bond

timony of
ard Prince.

between the new dirt and the old. The winter of '72 there
116 *a* was 3 feet of frost. Nobody could plow such ground as that,
and nobody grub that 3 feet of frost. Those deeply interested
hurried the completion of the levee as fast as possible. There was
a good deal of pressure brought to bear upon the superintendent
and Commissioners and everybody seemed anxious to have it com-
pleted. The result was they went on and built the levee and did
not plow it. They did not grub and could not grub. I saw what
come out of the levee when it washed away occasionally. I took
some photographs of it, and there were stumps and brush and
things of that kind which were done in hurrying and pushing the
construction of the levee. As a general rule, although not abso-
lutely necesary, a muck ditch should be constructed to insure the
safety of the levee to keep it from washing away. Especially where
it is exposed to the percolation of the water under the levee from
the river to the borrowpit on the inside, or from the borrowpit
on the inside to the outside, because the thing that ought to be
done cannot be left out with safety. It is not a question of cost.
It is a question of construction. Some excuse for Commissioners
and superintendents because of the great desire to have the levee
completed, good or bad, and the people knew nothing about these
engineering questions. They did not know what a muck ditch
was.

In regard to fills, I saw many places where fills were made
with what is called high dip. A levee should be built more com-
pact on the outside than the inside. Just the opposite of railroad
construction. The center will settle more in inches than the sides.
We will bring the two pits of earth together. The reverse of that
construction will open it and leave a great crack, and probably
result in the destruction of the levee. This was very plain at
Running Slough by a crack of five or six inches wide, and a quarter
to a half mile long right in the center of the levee. It was an im-
portant construction for the purposes for which the levee was
117 *a* built. The center of the levee should have been kept down
just as building a reservoir. In the building of reservoirs
these principles are laid down. They are well understood; very
clear and satisfactory.

They have the reason of centuries at the back of them.

Putting in the perishable material was wrong of course under
a levee. There were a great many elms along the line of the levee.
Roots run under. If a muck ditch had been constructed, it would
have cut off lots of those roots and have reduced the area of per-

colation. Roots which run under a levee will rot when the trees are cut down and leave a hole through which the water will go. The danger could not be overcome by putting dirt on top. It was possibly a thing that was in the mind of the Commissioners. There were a good many places in the levee where the puddle wall, as it is called, should have been carried up to the top of the levee to prevent a percolation of the water through the levee. Where the levee crosses a slough it is very necessary to have no vertical bank on either side, but to have it as rough as possible either by plastering or by any other means, both above and below the water, so as to insure a bond of new dirt with the old. At the big cut-off there was a pretty good construction. At the cut-off break you could see the original formation. Nothing had been done to it apparently. Gun powder or dynamite, or both, should have been used to make it as rough as possible so as to secure a bond between the new dirt and the old. The subsequent history of this place has demonstrated these ideas very thoroughly and completely.

The material was used just as they found it, with no plan or 118*a* ideas in reference to making any portion of the levee absolutely water tight, and of course there was percolation through the levee which would have been avoided by a puddle wall carried up. Even if they had to bring the dirt for that for miles. It is a small amount of dirt.

The height of the levee was absolutely in violation of every authority and every experience on the subject. The bench mark which constitutes the data line of the levee construction was brought across from Hannibal, the high water of '51 and placed upon a large tree near the Ferry landing. I have no doubt but what that was correct, but this data related to a time previous to the construction of bridge or levee and there can be no reflection upon the engineer in charge of the work in that regard. The fifth of June, 1851, was the highest water at Quincy, and the bench mark was made there. There has never been a time since when the bench marks have corresponded. When it come to narrowing up five miles of water, to say 1,300 or 1,400 feet, it would necessarily have raised the water, and would insure the destruction of any levee which was based simply upon the height of that high water of '51. If the water at Quincy was up to the high water mark of '51, the water at Hannibal would be seven feet higher, possibly eight feet. The water line is not a straight line. It depends upon the cross section of the stream, its bends and a great

Testimony of Alfred Prince.

many other things. The location of the levee decided where to get the dirt. If you locate several hundred feet from the river, then it is possible to get the dirt on the river side. It would be objectionable to take the dirt from both sides, so that it would only be a short distance from the bottom of one borrowpit to the other. With that friable material the flow of the water under the levee would soon cut out a channel and let the levee down. That would unquestionably be the result. It would certainly be very dangerous to take the dirt from the inside very near the levee as
119 *a* was done. I have been along it a thousand times. The contractors were allowed or took opportunity of going down as far as they could. They would go down until they struck water as a general rule, and the borrowpit would cave in itself without any percolation of water. Then with the borrowpit on this side, the river or the slough would be pretty apt to insure the destruction of the levee. This false construction was through the most dangerous portion of this levee. The borrowpits were dug deep. Going down almost until the water stopped them. They dug out wet sand and the water got into the pit every night, and they could not go into it the next day. In regard to the slope it seemed to me there was not a slope of two to one on the land side and three to one on the river side, although I might be wrong. It seemed to me there were places which would not be more than one and a half to one, and possibly some places where it was one to one, although I had no instrument and could only judge. If you want to make an embankment against the high water of '51, you should make the levee four feet higher. That is laid down by writers. Some put as low as three feet and some as high as five or six feet. Depend on the location. It would certainly be unsafe to adopt a line lower than four feet above any known water. Then you have to take into consideration the damming up of the river from any cause, as the construction of cross dykes and railroad approaches and bridges and the riprapping of the base and reducing the water flow. All these things have to be taken into consideration. If a levee were constructed only to reach to the high water mark of '51 and no higher, I would not think it was of any protection to the land. To make this a protective levee I would abandon at once that location of the levee from where it crosses the Sny at the upper end and crosses Sand Slough. I would run on the east side of that;
120 *a* I would abandon every foot of the railroad and would see that the railroad was compelled to take out every obstruction to the flow of the river, and leave the Mississippi river a chance to get out. This is one thing I would do. Then whenever an erosion of the river was likely, I would move away from the river,

move the levee. I tried to get the people to understand this in 1880. When they finally concluded they would not abandon the levee, but would hitch onto it as an entirety, then I was satisfied that disastrous results must follow. To make it absolutely and perfectly safe so that no high water would affect it, would cost not any less than a million dollars. I was a levee Commissioner about the year 1885, I think. It is absolutely necessary to raise money in some way to keep the levee in repair. There is always more or less deterioration requiring repairs. They require repairs from year to year, rocks here and there and various things. A levee would not remain protective if properly built unless it had the power of maintaining itself from year to year. The power to construct and maintain must go together to make it successful. Remember when the courts held that the power to levy assessments against lands to make levees and keep them in repair was unconstitutional. The Webster and Updyke cases. I remember both of them. The break of '76 occurred shortly after. I went into the deed of trust to assist in filling up the breaks in '76. Did not know of any other way. The courts had declared the law unavailing, so could not collect any taxes. The old Commissioners took no charge of it. I owned more land at that time than any other man in it. I judge about 5,000 or 6,000 acres.

121 *a* Have sold off for $5.00 an acre in the last few years. The parties have never paid any principal, interest or taxes, and I may have to take them back. Don't want the lands back. Probably 1,200 acres left. Did not sign original petition. Had nothing to do with the passage of the act of '71. Opposed the construction of the levee. Prior to the construction low land brought about $300 a quarter. Timber was worth more then than now. By reason of the levee values have been intermittent. Rise and fall with the breaks or with the feeling of insecurity which the people have by high water. Depends upon the faith a man has in the levee. It is like land over some old earthquake or volcano. It is liable to burn up at any time and you may have to be running for your life. People have different ideas about this thing. Some say, "I offered my land last year for $5.00 an acre but I think it is worth $20.00," and some fool comes along and gives it to him. Fools never all die. Do not know anybody that has put money into lands down there, myself among the number, but what has lost money. My taxes have been in the thousands all the time and my receipts have been in the hundreds, and I find I am a loser. We are all in the same pit. I did not believe the levee was any account at any time. I bought land thinking that other people

ny of
d Prince. would think they were worth more than I gave and I would sell it at a profit. Whenever I get a chance to take advantage of those liberal ideas I intend to sell. Never did think it would amount to anything, and do not now. (Witness identifies letter of Francis Palms and M. W. O'Brien written to himself.) Letter is dated April 15th, 1887; received it about that time. Had it in my possession since. Received in due course of mail.

(Letter introduced in evidence.)

The canal at the lower end of the Sny is entirely too low to
122 *a* accomplish any result. First saw the canal in 1880. It was entirely too small. Whenever the Sny was full the canal would overflow without any break in the river.

Cross-Examination by Senator Palmer.

Since '71 and '72 made engineering my business. Went to Holland in '78 and made this class of engineering a particular study. Knew Mr. Corthell. Did not regard him as a competent engineer. Mason was a good engineer, and the Commissioners employed Corthell on Mason's recommendation. At the time of the passage of the act I owned about 5,000 acres. No recollection about the pendency of the bill or effort to get it through. First read the act in a little circular. Knew steps were being taken for the appointment of Commissioners. Probably read newspaper statements. Do not think was ever asked to sign petition. Got the impression that the Commissioners were to issue bonds and pay for the levee in bonds to the contractors. Cannot give date. Was notified by the Commissioners to pay my taxes, special assessment. I probably had notice to appear if I had any objection to the appraisement of the lands. I made no opposition. I criticised, but did not enjoin or have them indicted. Did not go into court about it. Saw the surveying parties. Argued with them. Corthell was chief engineer, Mr. Clark general superintendent. Right of way and such things. Have an impression there was a second issue of bonds. Owned about 5,000 acres at that time. Bought land after the Updyke decision and knew there were assessments had been made against the land had not been paid. Am a defendant in this suit and Mrs. Prince also. The first error, the error of location was much talked about; did not talk to Mr. Corthell who was the one from whom to get satisfaction. In
123 *a* contemplation of the levee prices advanced, many of the defects came to me subsequently by reading and observation.

Everybody got rich. One man paid $10 an acre, another $20, $30, $40, $50, anywhere. Too valuable to be transferred. A kind of Garden of Eden. I expected it to break any time, when the water stood high. The levee would stand alone, but not with water. The breaks of '76 dissipated these hopes. Made a clean sweep of everything. Think I signed the trust deed. About '77. Did not expect the trust deed would make a good levee. Think that was the popular expectation, but not mine. Paid assessments under the trust deed. The trust deed was to repair the breaks. I became a member of the new organization in 1880. Was a Commissioner with Mr. Hardy and Mr. Willis. Was clerk of the board. Remained in office about a year and then resigned. Lands advanced up to '76 probably three fold. I made a little money by buying at $100 and selling at $300. Do not think I made more than $1,000 or $1,500 in the whole transaction. Taking advantage of these reaches of levee where available and secure, to make a protective levee would now cost $1,000,000. Most important change is the relocation of portions of the levee. Would utilize some part of it and would increase the height of it. Most important thing is the relocation of the levee above Hannibal bridge. Have no faith in this levee protecting the lands. Am paying assessments. In the last two or three months have paid $1,300. Am continuing to pay so I can unload, in the hope that public confidence will keep up. That is my entire scheme so that I may sell.

Testimony of Edward [illegible]

CAPTAIN M. W. HUGHES, examined by A. C. Matthews.

Testimony of Captain M. W. Hughes

Reside in Fall Creek township, Adams county, about 15 124 *a* miles below Quincy, in the levee district. My home is on the bluff. Resided there when the levee was constructed. Bought land in the district in '74. Sold in '86. Owned when the first break came, in '76, about 180 acres. All improved. Put buildings on it. Bought some for $5 an acre and some for $15. Had about 100 acres of wheat. Worth $10 an acre. Had 100 acres of corn. Lost the wheat and corn crops. The soil also washed off as deep as we plowed it for corn. I assisted in filling the break. Raised money. About $525. Had no other means of getting money. Raised it by private contributions. It went into these breaks. Think I was a party to the deed of trust. Object was to fill up these breaks in sloughs. Am not a defendant in this suit. Sold out in '86. Did not make any money there. Do not know of anybody who did. After the levee more land was put in cultivation. The farmers came out behind. Worse after

mony of in M. W. ses.

than before. Before the levee they did not have as many improvements to wash away. All my neighbors sustained a heavy loss in those rises.

Cross-Examination by Senator Palmer.

My land was in section 28, 3-8. Acquired the title from Denman. Sold 80 acres to Krail and one part to Kennedy & Robinson. Bought in '74.

mony of in Greene.

DENNIS GREENE, examined by A. C. Matthews.

Signed the original petition after the explanation of Major Clark. Owned 80 acres of land at the time at Sny district. Land was in cultivation. Two miles above Hannibal. My wife owned the land. She inherited it from her father. We have 20 acres besides that. An undivided part of 55 acres which the levee 125 *a* runs through. Owned 80 and 20 and an undivided interest in 55, in my wife's name, Matatia Greene. She was a Smiley. Signed the petition with the understanding that a protective levee was to be built and properly maintained by a system of assessments against the lands. These two propositions influenced me in signing, but for that would not have done it. Lived on the land. Abandoned it in '88, the day of the last break. Got disgusted with it and left. Never made a cent out of it. Paid assessments right along. Pretty heavy. So heavy I do not know where the next sack of flour is to come from. Just about the same with my neighbors. But for the inducements stated by Major Clark would never have gone in.

Cross-Examination by Senator Palmer.

Was told cost of the levee would be assessed on the lands. Do not remember how the explanation was made.

Re-Direct Examination by Col. Matthews.

Understood the contractors were to be paid in bonds. Not by collecting the money, by paying in bonds. I mean they were to take the bonds and sell the bonds themselves.

CALVIN R. MILLER, examined by A. C. Matthews.

Testimony of Calvin R. Miller

Reside on the Sny. Below Gravehill. Been here over thirty years. Southeast quarter section 26, 6-6. Bought in the fall of '74. They were working in Blackwood Bend about that time. Been living there ever since when I could stay there. Was owing to the water whether I could stay or not. Have not had over four or five crops that paid in seventeen years. Lost every time the levee broke except once. In '81 only overflowed about 126 *a* ten or twelve acres on me. Lost wheat crop in '80. Had it in shock. It broke in the spring and fall. Had a wheat crop sowed in the fall also.

Was along the levee frequently while they were constructing it. Never saw any muck ditch. They never grubbed any that I saw. My land ran right out to the levee. They built opposite me in the fall. It was simply cut off and they put dirt on. When it broke there in '88 it broke right below me. There were seven stumps, one three feet high. Some large stumps in the center of the levee in the break. It did not take long that time to take the levee right off. We were induced to buy and come in there on the belief we were to have a protective levee and that it would be properly maintained. That was my understanding; with that belief I went in. Neighbors entertained the same opinion. All believed in it. Could not sell out and get out even. After the levee pushed away, counted eleven stumps in the break, 250 feet wide. No muck ditch. Never had been grubbed at all. There was a log right parallel with the levee. Looked as though it had been in the ground. No mistake about the stumps at all. Levee no more than six feet high. Water lacked two or three feet being over it. It is high ground there.

Cross-Examination by Senator Palmer.

When they repaired it they grubbed out the stumps and put in a puddle ditch. The Government rebuilt it on the same ground. Riprapped it. Only own eighty acres now. Had 260 when I started in. Paid $1,400 for the 260. Advanced in value until the break. At one time suppose I could have sold out for $25 an acre. After the break could not sell it at all. Title was in 127 *a* Mrs. Miller's name. She died leaving one child and he is dead. He left three children. Those three heirs own one-half of the forty. His name was Newton J. Miller. The children's names, Charlie, Minnie and Homer. I signed the deed of trust.

Testimony of J. H. Dickason

J. H. DICKASON, examined by A. C. Matthews.

Live in Hannibal, Mo., right across the river from the Sny levee district, since '58. Became actively acquainted in the district in '75. Bought my first piece of land in '75. Little over $5.00 an acre. For 330 acres I paid $1,850. For 80 acres from Bennett, I either paid $500 or $700. For 40 acres from Davis, $300.

For lands in 33, $3.00 an acre. For the north half of 26, 5-7, I paid $500. Prices I paid arranged from $3.00 to $6.00 and $7.00; averaged not far from $5.00. Cut timber off my land for a dozen years. Worked on the levee every time we had high water. Levee was not high enough. It was not wide enough. Did not have dirt enough in it. What there was there, was improperly put there in many places. It was not a protective levee. It would take twice as much material to make a levee. Saw them begin to make the levee. They placed dirt on four or five inches of solid leaves of grass. Did not understand the danger of that then as I do now. Do not agree with other witnesses as to inflation of price. There never has been a day since the levee was first projected that I could not go into the Bottom and buy a reasonably good quarter for $500. When you get down to the naked land without any improvements, the value was $3.00 to $5.00 up to the time the levee broke. Then she went right down to where it was before. Would sell my lands to-day for $5.00 an acre plus the value of improvements, which would run from $6 to $8 per acre.

Cross-Examination by Senator Palmer.

Had no interest in the matter and first became acquainted 128 *a* with the levee when they began to work on it. No recollection of reading any newspaper article on the subject. Was on the levee once while they were constructing it. Acquaintance with the Bottom and the people of the Bottom dated after I bought my first land; knew it was subject to overflow. Never talked with Clark until after the levee was there. When they were at work on the levee at Louisiana had an interview with Clark on the steamboat on the river. I took the position the levee could not be a success. Clark thought it could. Did not learn how the funds were proposed to be raised until after I got to buying lands. Knew it was constructed upon a bond process. Knew my lands were subject to assessments when I bought them. Bought my lands for the timber. Have never been on the levee when there

was a break. Think I signed the deed of trust. Understood when the decision of the Court was made that the bonds had been defeated. Understood they were not paid. Knew these facts when I bought my land. Knew the levee had been built and bonds issued, and the Courts had made some decision favorable to the people down there. Think am correct in my estimate as to the advance in lands. Did not hear of the suit on the bonds until the people talked about it after they got the decision. Never heard of any debt on the lands. May have, I do not know. First time I knew a suit was brought upon those bonds was after the people discussed it after the decision. Testimony J. H. Lilch

J. K. SCARBOROUGH, examined by A. C. Matthews. Testimony J. K. Scarboro

Have resided in Payson township, Adams county, most all the time since 1838, about 5 miles from the upper part of the levee district. Have heard the testimony of Samuel Spencer and
129 *a* Major Clark. Lived near Spencer at the time the levee was first talked about. Have no recollection of the meeting at the barn. Mr. Clark came to my house and talked about the building of a levee. Could not tell what time. Before the levee was commenced. No recollection of signing any petition. Mr. Clark talked to me about it and I assented to it. I most assuredly understood the levee was to be built and maintained by assessments against the land benefited. Both built and maintained by that system. I never would have gone into it unless it was understood it was to be maintained as well as built. Understood afterward that the contractors agreed to build the levee and to take for their pay bonds to be issued by the Commissioners at 90 cents on the dollar. That has been the general understanding all the way through. Wheelock lived not more than a mile and a half from me. I had a half interest in three quarters in Kinderhook township and in six quarters in Levee township. Commenced work on the levee about '72. Very few roads leading from the bluff to the river. The real value was not very largely increased by the levee, but I mean intrinsic value, not speculative value. Had a couple of good years due to the levee. I would put the increase lower than Captain Dickinson. Bought swamp lands which I put in cultivation after but not before levee was built.

Testimony of Scarborough.

Cross-Examination by Senator Palmer.

I own three-quarters of section 30, 4-8; also, section 25, 4-8. East half 11, 4-8; northwest of 13, 4-8. Some of my deeds from Spencer contained a levee assessment reservation.

Think I got my information from Mr. Clark. Contemplated assessments according to benefits and issuing of bonds to pay for its construction. Also to keep the levee in repair. Do not remember second issue of bonds. Had forgotten if I signed the second petition. I signed the trust deed. It was to raise 130 *a* money for filling the breaks. We had no law to tax anybody. The law had been declared unconstitutional. The law broke down and the levee broke down. To meet that trouble this trust was gone into to fill up the breaks, with the design of continuing this until we could secure legislation which would enable us to levy an assessment upon all the lands. After the law was declared unconstitutional the Commissioners held no meetings. The general understanding was it had broken down, and the Commissioners went out. The citizens then took hold and contributed voluntarily. The same Commissioners were made trustees because they knew more about the levee and would be capable of acting.

Testimony of Chamberlain.

A. G. CHAMBERLAIN.

Have resided in Berry township since '47, probably 7 miles from the overflow district. Am a surveyor by profession. Been engaged in that business 40 years in this country. Have been county surveyor. Do not make engineering my profession. Have done engineering work. Know something of it. Have done a great deal of surveying on the Sny Bottom. Did not survey much out of Pike county. There is a road running under the bluff in Pike county, known as Atlas and Quincy road. It is a main thoroughfare from Calhoun county up towards Pike and Adams counties. There is no other road running parallel to the river. The Bottom between the road and the river would average about 4 miles wide, I think. There were roads running from this main road to the river in 1872. The gravel road from the bluff to Hannibal, also a road from Kinderhook to Cincinnati, also a road from New Canton to Cincinnati, then one from Rockport. The gravel road was about 11 or 12 miles from the road from New

Canton to Cincinnati. The Kinderhook road extended from
131 *a* Kinderhook to the Sny bridge, and there connects with the Canton road. The next road going south is from Rockport to Gilgal. It is about 8 miles, I think, from the Cincinnati road. Then there was a road that led from Cincinnati to the bluff road at that time. Mr. Clark and I were together seven days ending July 15, 1871. We went down as far as Pleasant Hill on the bluff road. Do not think we traversed all the roads. Our time was spent mostly on the bluff road. Our object was to see individuals. Carried with us a petition to the County Court looking to the construction of this levee. Where we found a land owner we stopped and explained it to him. Have learned since I came here that we got about 110 signers. It was explained by Major Clark to all these men that the object of this law was to construct a levee and maintain a levee by taxation against the lands benefited. That was the substance of it. Some seemed to understand it well. They went in with the understanding they were to build a levee and keep the levee in repair, both connected together. The idea we carried was that a protective levee could be made for about $5.00 an acre. That was my idea. That was Major Clark's idea. We told the truth as we understood it. I knew little about levees. John McDecker and I signed this petition. We did it with the understanding we were to have a protective levee. That was my expectation. That influenced me in going into it. It was the only object, both to build and maintain it.

(Witness testifies to the names of land owners visited by Mr. Clark and himself.)

About New Canton, the two Bramells and Cumbler, and
132 *a* the three Talbotts, Massey, Prasters. That was the result of the canvass. Went out on the Gilgal road probably as far as Cockleburr; also on the Louisiana. Saw Yokum and the Thomas'. The meeting at Pleasant Hill was small. Somewhat larger at Rockport, probably 25 or 30 there. Rockport not as large now as it was then; most of the New Canton meetings were well attended. Did not attend the meeting at Kinderhook nor at Payson in the barn. I do not believe we saw the owners of one-eighth of the lands. Did not meet all the people in the overflow district. Did not see all the people that I, myself, knew owned titles in the district. Titles were badly scattered. I owned land on the Bottom, but do not now. Sold out because I got tired of them. Before the flood of '76 thought I was reasonably well-to-do. I had 4 houses, 4 miles of fence and 140 acres of wheat at

Testimony of Chamberlain.

the time of the break. Was induced by the building of the levee to go in there. Thought a protective levee would be built and went to work in good faith. Believed the levee would be built and maintained. In '79 I harvested and had a crop of wheat, and somebody else wanted the land and I let it slide. Been along the levee frequently. I knew nothing about levees. I never thought it was high enough. I always thought it should be 3 feet above the water of '51. Cannot say I ever fully believed it would be protective. Labored under the hope that some day it would be built higher. Experience has shown that it lacked in almost every respect. The stumps underneath make weak places. Taking the dirt from the land side and the size of the levees are defects. Gave $2.50 and $3 an acre. Prior to the break of '76 land apparently went up. I valued mine at $35 an acre. When the break came values went back and I doubted whether it was worth the money I gave for it, $2.50 to $3.00 per acre. The value depends upon the success of the concern. They will never be able to have a protective levee for the next 20 years, owing to the stumps and 133 *a* the like. In '80, after the water came to the danger line, I rode on the levee. It was leaking at every point except the cut-off. I felt we had no foundation for the levee. My impression was very strong then that we never would have a levee, because we had no place to put it, but have changed my mind some since. Have since learned that leakage can be stopped by putting in the muck ditch. My understanding has been from the beginning that the contractors were to be paid for the levee by bonds.

Cross-Examination by Senator Palmer.

Went with Mr. Clark after they had canvassed the upper end. Probably one-sixth of those who lived on the bluff were land owners. Was invited by Mr. Clark because I knew the country and the inhabitants. Knew the general situation of the Bottom. Knew that a large proportion of the land belonged to unknown owners, and that the population was very spare. When we started, had no purpose as to the number of names we would obtain. Do not know who wrote the petition. (Witness identifies the original paper). Do not think the signers owned any more than one-eighth of the land. Could not fix the proportion. Aimed to get as many as we could. What proportion we did get I do not know. Stopped because we thought we had got all we could. Mr. Clark had charge of the paper. I only went with him, and only part of the time. I was not a leader. There were several landowners whose names were not there. Lived here at Pittsfield and at dif-

ferent places. Think they were not called on. In the bottom we did not aim to miss any, but I presume we did miss some. Cannot say that I was familiar with the subsequent proceedings with regard to the levee. Did not know about the report made by
134 *a* the Commissioners as to the cost of the levee. No recollection of the meetings of the jury. Did not know of a subsequent assessment. Knew the proposition was to build the levee at the cost of the land owners. Mr. Clark explained that point. Read the law. Answered the questions that the different persons would ask. I bought no bonds. Took no part in the construction of the levee. McTaggart and I owned about a thousand acres near the levee. Went to work in good faith. We thought we were purchasing a little better than the average. McTaggart was killed on the railroad. The heirs and I had a division. I sold the land I got in the division for $6,200, 431 acres. When the levee was completed I thought it was not high enough. I regarded the levee as justifying a very considerable amount of work upon my lands. There are men of better judgment who looked at it differently. There was a marked advance in the price of lands before the first break. The asking price would not average more than $10 an acre in its highest time; from $5 to $15, but would be $25 at Hannibal. Before the levee was built, probably $2 an acre. I suffered in the break of '76. I think the losses in '76 were less than it would have cost to put the levee in good protective condition. Break of '76 was the loss of half a million dollars. Do not think a half million of dollars would have made the levee good. The levee is not regarded safe now. Impossible to make it safe on that foundation. Saw the break of '76. Water was from 27 to 40 feet deep in the break. Break probably 250 feet. There was another break in Blackwood bend a day or two afterwards. I did not see that. Break along the railroad was probably 500 feet. In '88 the break below the Wabash was about 250 feet.
That's where the levee was just simply taken off. I was
135 *a* there the day before the break. The water was running over and trickling through the dirt all the way for nearly half a mile. I was there after the break and saw from eight to twelve stumps, and those near the upper end of the levee, where it has been talked they worked up the contract. And I was astonished there was a stump there. The whole length of levee 52 miles. Do not think all the breaks together would amount to one mile. This would be 50 miles of levee which had not yielded. I believe there has been no break where any of the new levee has been put up. The parts that were destroyed were defective. Built wrong, covering up stumps, no muck ditch or anything of the kind.

timony of. J. Chamberlain.

There was a slough working. The new part that has been constructed I think has been perfectly free from timber. If the weak places had been foreseen they might by proper expenditure of money have been prevented. Some of them, not all. Riprapping would have done it in some, not all. After the levee was built we took steps to protect it mostly by voluntary subscription. Not a third enough money was expended to make it safe. From my observation, I think the levee would have been broken; with all the care any person would have thought necessary it would still have broken. Think the break in '88 was because the levee was too low. It had then been in the possession of the land owners many years, some 17 years. Want of height was patent to us all, all that time. I was over the line for three miles the evening before the break. The water was running over it in many places. Requisite height would have been four feet above that. The river raised one-half inch in an hour that afternoon.

Re-Direct Examination by Col. Matthews.

I cannot tell whether I got my money back on my investment or not. Did not keep accurate enough account to tell. Think one mile of the levee washed out. Simply guess work. That 136 *a* leaves fifty-one miles still to wash out. Where a break occurs the water fills up the land side and relieves the pressure, and the levee remains an island or peninsula. So there would be no more breaks after the water filled up around one break. It is the breaks relieving the pressure that has saved the balance of the embankment.

That does not show that the other embankment is good. The other fifty-one miles might never go out at all, if one of the breaks was left open, unless there come eruptions from the ground streams and wash it out. The levee Commissioners or land owners had not the money to prevent the breaks, some of which they foresaw. The whole concern has been bankrupt since the beginning. It broke in '76, a few months after they completed it in '75. Have since learned that about the time of the break in '76 the Court held the levee law unconstitutional. You cannot get me to say that there can be a proective levee put on that embankment. Strength of the levee like that of a chain, is determined by its weakest part. I infer that the remaining fifty-one miles of the levee would have broken if the pressure had not been relieved from the fact that it was constructed in the same way, and was not high enough, which we knew since the break of 1876. Below my place

work was done in the winter of '72 and '73; I was down there. The ground was frozen. If they left it all night, it would freeze so solid they could not plow. So they kept their teams running, sometimes 5 teams to a plow. I observed they were not grubbing it. They were putting in no muck ditch. I had evidence then that they were not going according to specifications. I had read the specifications several times. At that particular place the levee has stood because it is on high ground. Testimony A. G. C...

137 *a* William H. Gay, examined by Harry Higbee, testified as follows: Testimony Wm. H.

I live at Rockport, and have resided in Atlas township all my life. Have worked in the levee district since I was able to work at all. I became interested in lands on my own account in the district in 1874, and have been familiar with the bottom lands all my life and know a great many of the land owners. At the time the petition was circulated by Mr. Clark the bottom was rather sparsely settled. There was a line of settlements along the bluff roads and along the roads leading from the bluffs to the river.

138 *a* There was no thoroughfare north and south out in the bottom. The bluff road was known as the Atlas and Quincy road, and was in all but a few places outside of the levee district along the foot of the bluffs. The roads leading out from the bluff roads started out from Kinderhook, New Canton, Rockport, Atlas and Pleasant Hill running to the river. I don't think I knew anything about the petition except in a general way as current report. I had nothing whatever to do with it. I heard land owners and men transacting business in land speaking about the organization of a district for the purpose of building a levee. The object of building it was to redeem the lands, and maintain it for the purpose of cultivating those lands. I heard it said in a conversation between William Dustin, J. D. Rupert and G. J. Shaw that the maintenance of the levee was as much a part of the object as the original construction of it. Dustin was one of the original commissioners. The levee, in my opinion, would not have been of any value to the land owners in the district if it had been built and no arrangements made for its maintenance. In that event it would have proved a damage. Repair would be necessary for the reason that the elements would destroy it, people in hauling across it would cut it down, the pressure of the water would wear its way through it, animals burrowing in it would open ways for the water to pass through, and all these defects would have to be corrected each year, continually. I was familiar with the owners of lands at the time the

mony of
. H. Gay.

original petition was signed, and have heard read the names of
139 *a* the persons who are said to have signed the same. I am satisfied the list of signers is not a complete list of the land owners. I took a list of the names as shown by the bill, and taking the district from Rockport as far as Pleasant Hill, beyond which I am not very well acquainted, about nine miles, the names I have taken of land owners who did not sign the petition are James Coe, who owned about 50 acres in the district at that time; Jackson Shaw, 100 acres; Ladice Marion, I cannot say how many acres; Henry Yokem, I think several quarters; Dudley Yokem, the same; Kennedy Long, perhaps 50 acres; William Ousley, a considerable amount of land; Marion Yokem, a considerable amount; William Dustin had quite a large amount, Clark Lovett quite a large amount and William Newman a large amount. I cannot give the amount of acres for the following names: Lindsay Sapp, Columbus Sapp, Henry Sapp, William Snider, Sol Yokem, Zeph Webster and David, Logan making twenty names. I counted the number of names on the original petition of the parties within the same district I have covered and there were seventeen. I think there were more parties who owned land there whose names are not on the list than there are of those who have their names on the list. I visited the works very little during the construction of the levee and was not familiar with the manner of its construction from observation. I have been familiar with it since 1876. I bought my land in 1874 relying on the contract that the contractors had with some one to build a protective levee, and gave very little attention to the manner of building it. I thought that was to be attended to properly as
140 *a* a matter of course. A break occurred in 1876. I hear at that time about the decision of the Supreme Court. After the break of 1876 the levee district was demoralized; everything gone to rack and ruin. The break of 1876 and the decision of the court in the Webster case reduced the value of lands in the district until they had no real value. I don't know of any purchasers for land at that time; land had no real salable value. To illustrate, the lands had been assessed by the township assessors about '74 at an increased value from what they had borne before the levee was built. I think the land had been assessed as high as ten dollars an acre, perhaps more, owing to the improvements being put upon them and the way they had been sought after. After the decision of the Webster case and the break in the levee I carried a petition to the board of supervisors here asking for a reduction of the assessment, and a reduction was granted placing the lands in the neighborhood of two dollars per acre. Before the levee broke the land-owners gathered and did all in their power to prevent its

breaking. Individually, as land owners, they turned out generally to protect the levee at that time. I canvassed the land-owners in my neighborhood for contributions to put it upon the levee to protect it, before the levee broke. After the levee broke, and after the decision of the Supreme Court, the land-owners perfected an organization to protect their interests, and a few of them entered into a trust deed. They did something by voluntary contributions before the making of the trust deed. Money was raised and
141 *a* work solicited, and a good deal of it was expended in trying to prevent the levee from breaking before it broke. The balance that was left of the amount that was solicited and contributed was used to fill the holes where the levee was broken; in order, in the first place, to prevent its breaking, and in the second place to prevent or lessen the inflow of water, that a corn crop might be raised upon those lands. I don't think they succeeded in raising money enough to fill up the break so a crop could be put in, before the trust deeds were entered into. The '76 break was filled before the trust deeds were executed. It was done under the direction of the active land-owners, without the direction of any one else that I know of. They came with their teams and worked as long as they could work, and when they went out to go home some one else was ready to hitch on in their places. The old commissioners had told the land-owners that the law had been declared unconstitutional; that they held no office and put up no claim. The land-owners were looking out for themselves. I entered into the trust deed. Under that an assessment of thirty cents per acre annually was contributed upon the lands entering into the deed for the purpose of filling the holes in the levee. I think that the money that was raised under the deed of trust was put into the holes. The work was only partially successful, as they didn't have money enough. I remember that a new organization was formed in 1880. I understood it had a less number of acres than the old district. It was formed because there was no organization or law by
142 *a* which these people might be protected in raising their crops or subsisting on this land until some other organization was had. There was no way of maintaining the levee or protecting the land except by means of voluntary contributions or through the trust deeds, the latter of which was not effective because quite a small part of the land owners entered into it. The next break was in 1880, after the new organization was perfected. There was a break that year about the cut-off and one below the break of 1876. On June 23rd, 1881, there was a break at Hoffman's, on October 19th, 1881, a break in Blackwood's, also one at Stillwell's, and on May 17th, 1888, a break at Murphy's bay

timony of H. Gay.

which was the last break. The land owners did all in their power to prevent it and turned out to help protect it. They worked for days, sometimes weeks, before the break took place. They went at the direction of the present commissioners and of their own will. The land owners at other time when no breaks occurred, by their working and constant attendance prevented the destruction of the levee or its breaking. In 1892 a great deal of work was put on the levee, I worked there myself. The levee was patrolled from one end to the other during months of that year. The high water came more than once that year and every time the land owners turned out and helped to protect the levee and patrolled it, covered it almost every few rods. They camped there at night and stayed all the time. It was necessary to build up the levee higher than it was and we took dirt from one part of the levee and carried it to another and raised it up. It was built up with boards,
143 *a* siding and other lumber, and sand bags, thousands of them.

On all these occasions the land owners did everything that could be thought of to prevent the breaking of the levee. During all this time the present commissioners raised money by asessment and put it upon the levee. Had it not been for the efforts made to protect the levee from time to time during the high waters it would have been broken many times when it has not broken. Of late years I have been familiar with the levee from one end to the other. It has not been a protective levee. I didn't see the levee before it was done, but I saw evidence of defects in the construction since. At the time of the '76 break I was about the first party that reached there from the bluffs. There was then a large stump about half uncovered sticking in the end of the levee. It hadn't washed out yet. I didn't notice stumps or logs in other places in breaks of the levee though I heard of them. I was on the line of the levee a number of times, never saw evidence of a muck or puddle ditch being dug. In places the levee is located too near the water. It was impossible, or at least they didn't take the dirt from the outside or river side of the levee, but dirt having been taken from the inside caused the levee to become dangerous from the seepage or percolation of the water through or under the levee into the borrowpits. I have observed that myself and have helped fill up these pits. I heard the evidence of Colonel Prince and other gentlemen in reference to the defects in the levee and concur with what they said about them. I
144 *a* have seen portions of the levee giving way before the pressure of the water and moving into those borrowpits. Then it would slough off from time to time towards the center of the levee which if not checked would let the river through. In my

opinion the original construction of the levee was defective. I know that it was not high enough. I know the height of the '51 water by observation and by the land marks and I know the height of the '58 water in the same way. I know from the height of the waters of 1876 and '80 and by comparison that the original levee was not high enough to hold those waters back. I know from my own observation there have been times when the water would have gone over the levee as now constructed, or was constructed originally. I have seen it when it would have gone over the levee. in 1876 the values of lands were practically destroyed. I have been farming in the district since and am familiar with the profits of other men who have been carrying on farms there. In my opinion, judging from my observation and the operations of other men the results of carrying on farming in that district for the last ten years have not been profitable. The money received during that time from the farms has not been as much as the money spent to keep them up. Tenants starved out and left and we had to start out with fresh ones often. I can not call to mind anyone being successful in the long run in farming these lands. At the time of the break of '76 I estimate that there must have been 50,000 acres in wheat worth 10 dollars an acre or more. The loss of the wheat crop alone must have been $500,000. We had 145 *a* extensive fencing at that time. I expended about $1,500 I think in improvements on my land between 1874 and the time the levee broke in '76. My fencing was a total wreck and the same was true of the fences over the district. A few of the houses were washed away though as a general thing they were all badly damaged. I estimate the losses of fences, houses and other improvements at $200,000 and that is probably too low. I mean $500,000 for the wheat crop and $200,000 or more for the improvements. There was a large amount of labor expended that year in trying to raise a corn crop after the wheat was destroyed. The corn crop was destroyed by an overflow in the fall. I think two dollars an acre was expended on about 40,000 acres of land in trying to raise a corn crop which was lost. The loss in 1880 was very great.

Testimony Wm. H.

There were probably 1,000 acres of wheat and 40,000 acres of corn lost. I saved a portion of mine but a majority of the land owners didn't save any wheat to amount to anything. The wheat was ready to cut and a great deal of it was in the shock. It was worth ten or twelve dollars an acre. The corn was laid by and was a magnificent looking crop, thrifty and growing nice when the water went over it. The corn crop was worth ten dollars an acre.

Testimony of Wm. H. Gay.

The loss of improvements, houses and fences, I put at $200,000. The next break was in 1881. A break occurred in the spring of that year and another one in October. The break in the spring destroyed the wheat, consequently the acreage of corn was very large. We had a magnificent corn crop. I think I lost fully 146 *a* 3,000 bushels of corn that fall and my loss in corn must have been $1,500 and the cost of gathering, about two cents a bushel. I think the loss of the wheat crop that year was about $250,000 and for the corn crop $700,000. The loss of improvements was not so much as before. The next break was in 1888, when the wheat crop of course was lost, I think about 40,000 acres worth eight dollars an acre. The loss to the corn crop was not very much that year except the loss of the use of the land that year. By that time we had gotten our fences back in good shape and built up our improvements and the loss was great, $200,000 to say the least. The damage continued after the levee broke for some time as a great many lands would have to lie idle in a measure and grow up to wire grass. After the break of 1876 the lands had only gotten to be generally used again when the break of 1880 occurred. The tenants would starve out, leave the bottom and after a while others would come in. It took usually from four to five years to get fences and improvements back and confidence restored so the bottom would be in cultivation as it was before the break. We had just prepared to get a full crop in 1880 when the levee broke. I can't say how many crops were raised on the bottom between the breaks of 1880 and 1888. There were a few years that lands were not generally farmed to advantage, a good many lands lying idle, and a large portion of the bottom was idle at that time or only partially farmed. I don't believe a full crop was raised between 1876 and 1880. Be-
147 *a* tween 1880 and 1883 there were, I think, more than two crops planted, but not more than one or two full crops. After the break of 1888 it took some time to get things going. Since then we have probably had two full crops. Since 1888 there has been practically no high water and during that time there was also a special assessment of $100,000 put on the levee. In 1888 the levee was badly washed and it took a great deal of money to replace the dirt. The levee could not be made stronger than it was before, because the money was expended in repairing all the time or attempting to make it as strong as it was before. The large amount of money raised by special assessments had to be put into the breaks. I think there were twenty or thirty breaks that year.

On cross-examination the witness, examined by Governor Palmer, testified as follows:

I own 167 acres of land in the Bottom. I have been served in this suit. I formerly owned two other quarters. I don't know whether there was any reservation in my deed excepting levee taxes. I was familiar with the values of lands in the bottom prior to the construction of the levee. They ranged from one to fifteen dollars an acre I suppose. While the levee was being constructed lands were enhanced in value. Raw lands sold as high as ten dollars an acre. I suppose some lands sold for an advance as much as the assessments that were made for the levee. I think the apparent advance in the market price was, on an average, equal to the assessments. I don't believe however that the current market rates were advanced as much as the lands were assessed. They were assessed about $6.50 an acre and the advance was not 148 *a* that much. Some sales were made at a greater price. The people had relied on the validity of the Act of 1871 and they had relied upon the levee. It is not true that the decision of the Supreme Court in 1876 enhanced the value of lands. It didn't, because after that we had no means of perpetuating our levee and protecting our investments put in there. The decision had the effect of depressing prices. I believed at that time that in connection with the payment of the assessment the provisions of the statute enabled the people to protect the levee. The decision created a greater depression than the high water because the high water simply made a break which we could go ahead and fill up, but after the decision the belief was general that there was no law under which the people could organize. Between the time the decision was rendered and 1876 we raised money by voluntary contributions and worked to protect the levee. There was no organization then. We depended upon voluntary contributions up to the execution of the trust deed. We didn't think the money to be derived from the trust deed would be sufficient to protect us but we thought we might exist under it until we could get an amendment to the constitution of the State and legislation under that amendment by which we might protect our investments. We went into the deed in 1877 I think. After legislation in 1879 I took part in the organization of the present drainage district and have co-operated with the parties interested ever since. We made the deed of trust because we were without any provision of law by which we could protect ourselves.

Testimony of Wm. H. Gay.

149 *a* After the Webster decision we land owners went to work to do what we could to protect ourselves. I don't understand that the levee was ever supposed to be completed. I don't believe it to be. After they quit work on it there was no other work done until the land owners commenced work in the way I have described. When I bought my land the levee was not finished. When my attention was called to it first, after they had quit work, I didn't think it was secure, and when I had ceased to rely upon the parties who had constructed it controlling it I gave it some examination. The fact that it kept back the high water of '75 encouraged me to more expense. I assisted in trying to stop the break of 1876; I assisted in filling it up. After that break was restored I was still satisfied the levee was unsafe, because I knew the height of the water and that the levee lacked a good deal of being up to the '51 water, and that if we had a very high water it would break again. It lacked width and strength. The fact that I saw a big stump sticking up in the end of the levee caused me to be suspicious of it. I have reason to believe that stump occasioned the break, or contributed to it. The fact that the levee broke at the place where I learned that they had covered up a stump caused me to think it occasioned the break. Trees have been cut down on the line of the levee, and where the roots of those trees or stumps would project under the levee on either side they would rot, leaving a hole that the water would flow through under the levee. I don't know that the stumps or roots produced the breaks, but I believe they did.

150 *a* The break of '76 cut a depth of 33 feet, and a stump was sticking into the end of the levee when I got there, about half projecting out of the levee. I don't think the stump could have caused that break. Since the levee was torn away to four or five times its natural height. I don't know of any other stump that could have occasioned it. I think there are hundreds of stumps covered up in the levee; I don't know it, however. I don't know what produced that break. I think the existence of stumps in the levee is a source of danger; or that stumps, growing or that had been cut off at the top of the ground, where the roots project through, are a source of danger. They leave a hole for the water to pass through. In 1881, in Blackwood's, there was a bad break in the levee. I, with others, worked upon it, and it continued to grow upon us. I was there when it broke and there was a log, or stump, came out right where the leak occurred. It was universally believed that it came out of the levee. It went away so fast we couldn't tell very much about it. It was a large stump or small

log; I can't say whether it had roots attached to it. It could not have come from the surface of the land inside; when I saw it it was too near the levee for that. I saw it pass out with the current, but admit that it might have come in, but don't believe it possible. Still logs and stumps were seen in the river side. The river could not encroach upon the levee at the point where the break was. The banks were in the condition they were when the levee was built. There were trees between the levee and the river. For some time the water ran through the base of the levee the size of your fist, of a stove pipe, a half-bushel, and when it got to be the size of a hogshead it went very rapidly. In the first
151 *a* instance the water was on the side of the levee where it came out. We surrounded it with a lot of sand-bags and dirt, but it was constantly being lifted and raised up and running out over them. We could not find the point of entrance. Just a little while before the break a straw bed-tick was brought and floated on the outside in the water to find the suck, and we found it. I saw the straw going through it in bunches, which were soon followed by the stump or log, which ever it was, and everything gave way rapidly from that time. I have a theory that when the water begins to flow up-stream and unite with that coming down-stream it piles up, and a vast width of water seeks to force its way through, and the water removes the earth until it arrives at this depth. It scours the bottom. The stump might have been on the surface of the earth or it might have been in the levee above it and still have gotten through there. I wish to state that I never took any part in the organization of this levee district or any of the steps leading up to it; that I bought my land in good faith and felt very much embarrassed by the decision which rendered us without law or the ability to protect our interests invested there. When I bought my land I knew the assessments were upon it; that they were for the construction and also for the maintenance of the levee, or I would not have bought the land. I didn't understand that the work of constructing the levee exhausted all the bonds; my understanding was that the contractors quit work because
152 *a* they could not market those bonds. I did expect that additional assessments would be made if necessary.

Testimony of Harrison Brown.

Harrison Brown testified, examined by A. C. Matthews, as follows:

I reside in Pleasant Vale township within three-fourths of a mile of New Canton and have lived there 36 years. I remember when an effort was made to get up a drainage enterprise on the Sny bottom in 1871 or '72. I attended a preliminary meeting at New Canton. I signed the original petition. The meeting was held in New Canton and was rather thinly attended ten or fifteen, or perhaps twenty persons there. Mr. Clark explained the object of the meeting the enterprise and what was to be accomplished by it. He said they proposed the building of a levee to protect the Sny bottom. It was to be a protective levee and was to be maintained by special tax after it was built and tested. It was to be built by a tax against the lands in accordance with the benefit to the land and to be kept in the same way. I went into the matter in good faith. I had 160 acres of land and thought if they put up a levee there at the figures proposed it would be a good thing. It was proposed to do it for five dollars an acre. My land was overflowed by the high water of '51. I lived within four miles of it at the time. The understanding was, I believe, that the levee was to be built a foot higher than the water of '51 and strong enough to hold the water back. My land was rather near the bluff. It takes about 15 feet of water to reach it. It is the northeast quarter of section 7, 5-6. I bought a part of the land in 1858 and cultivated it before the levee was built. I don't think I lost but one crop after I 153 *a* bought it after the '58 water and that was in 1869. The '58 high water was the next high water after '51. I understood the land was to be graded and the low land was to be five dollars an acre. Some of mine, I believe 118 acres, they put under the low water mark. I have cultivated my lands since. I don't think this levee ever protected my lands but twice since it has been built, and that was last year. Every time but that, when the water got up 15 or 16 feet the levee broke and then it overflowed it and I lost the crop, that was on it. I have gone on the levee and believe nearly every man who owned land down there went out and helped haul brush, sand and dirt and everything they could to protect the levee and keep it from breaking when in danger. That has happened every time it came up to the danger line which is about 16 or 17 feet. The whole settlement generally turns out before there is any real danger, they keep patrols on the levee and give the alarm. The people took their teams, plows, shovels and anything they can get and haul dirt or brush. A few days before

the levee broke I was there and there were 300 men at work on the levee that day trying to prevent the break. The water ran over in 1892 but didn't break it. When the water got to the danger line the peple universally turned out and assisted in holding the levee. If a man who owned land could not go he hired men to go. I was along the levee after it was constructed from time to time, and it was not heavy enough nor big enough to hold the water.

154*a* I was on it near Cincinnati in 1881 three days before it broke and the water was running there then as big as a barrel and continued to run that way until it went through. In consequence of the levee being feeble it was broken from time to time. Farming has not been profitable on the bottom since the levee was constructed. The men would raise a crop or so and then lose one or two.

On cross-examination witness testified, examined by Governor Palmer, as follows:

I bought land twice but it was all the same quarter, the latter part being purchased in 1867. I gave two dollars an acre for it. About 100 acres had been improved. For the north eighty I paid about $10 an acre. My land is some six or seven miles from the levee. I saw Major Clark at New Canton and heard him explain the plan and the means by which the money was to be raised. He said it would cost five dollars an acre. On that day I believe he took a collection to make a survey. It would be about $2,500. Our money was to be refunded in case the levee was located but we never got it back. I subscribed something for the survey. I signed a paper there that day, I believe it was the one just shown me. On the lands that were only overflowed by the water of '51 the tax was not to be so high. I understood it was to be assessed on the land in proportion to the benefits received and that those benefits would be fixed by a jury. After the levee was built there was some lands that sold for a little more than formerly. There was no advance in values for some time afterwards and after 1876 it went back to where it had been.

155*a* I think the first effect was to raise the value of the land, but I don't think it was a great deal right at the start, because there were a great many more people against it than for it. There were a good many people living on the bottom, but there were a good many tracts of land of which nobody knew the owners and nobody claimed it. I don't think the damage was equal to five dollars an acre. A good deal of the land had been sold for State and county taxes and went into the hands of speculators who

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asked more for it than it ever got to be worth. It is true that the lands the owners of which were not known and which had been sold for taxes looked up in price and value after the levee and a good many of them were farmed. I don't think I could state the cause of the break in the levee at any particular place, only that the levee was not big enough, high enough, or stout enough to hold. I have only seen three or four breaks myself, and that is within the bounds of ten miles. The first break I saw was the old 1876 break. I was not there when the break occurred and I cannot tell the cause of it. I was there in 1881 when the levee broke right close to where it broke in 1876, and the water was running through in a big stream, but the men could not locate the hole on the inside.

I say the levee was not strong enough because the water was running through it. When I was there it was running out about four or five feet from the top and they had sand-bags there all along for fifty or sixty yards. The water came out above the base of the levee. The river had not cut away the bank at that 156*a* place; it was a mile from the river. In the start there were more people in my neighborhood against the levee project than for it, but this was confined to my neighborhood. After the levee was constructed the asking price of the land increased, but I don't know of any of it being sold around there. I don't know as it is made any more valuable by the levee, that is any more valuable than it was before. I don't think the land was increased in its real value the amount of the assessments made against it. It increased the value of some lands five dollars or more, but others, it didn't. After the break of 1876 a man could hardly give away land unless it was to some one who didn't know anything about it. It went further back than it was before the levee was first constructed.

I had faith in the levee when they were talking to me about it. I didn't have faith in it up to the time it broke because I was there in 1851 and I knew the 1851 water would run square over the top of it. It was too low and was not heavy enough. Some of the land owners I am acquainted with increased the price of their land more than the amount of their assessment after the levee was built and some didn't, but the price fell with the levee.

William G. Smith testified, examined by A. C. Matthews, as follows: Testimony of Wm. G. Smith.

I reside in Pleasant Vale township two miles above New Canton. About ten acres of my land is included in the levee district. I bought it in 1853 and have owned it ever since, residing on it. I knew Mr. Clark and attended every meeting held by him in New Canton in relation to the levee, I think. Mr. Chamberlain called with him one day at my place and requested me to
157 *a* attend the meeting at New Canton and I did so. There was a general discussion of the matter and Mr. Clark was asked in regard to the manner in which it was intended to build the levee and how it should be maintained. I determined to assist in the work and took two shares in the arrangements made for a preliminary survey. I attended every meeting to keep posted in regard to the work. Mr. Clark read a section of the law stating it would give the Commissioners power to assess taxes for the purpose of keeping the levee in repair after it was built and it seemed to be satisfactory. The promise was given us that the whole cost should not be over 5 dollars per acre for the construction of the levee. It was to be maintained by special tax. Quite a number raised objections thinking it would cost too much, but I think Mr. Clark made the remark that it would not be very burdensome to them, that the interest only would be paid for three years. The levee was to be tested five years and then after it had been tested that time there was to be a sufficient amount of assessment made to pay the principal at the rate of one-tenth per year. After it broke a great many failed to come up with their assessments and became discouraged in regard to it and complained that the levee was not sufficiently strong. I and my neighbors went into the enterprise relying upon the promises not only to construct, but to maintain the levee. There was to be a special assessment against the land benefited both to construct the levee and keep it up. The same promises influenced my neighbors
158 *a* to go into it. I don't think the levee has ever done me any service. I lived within a mile of the place where I now live in 1851 and remember the high water well. The project included building a levee which would be high enough to hold back a flow equal to that of 1851. After the break of 1881 my son and son-in-law who were carrying on my farm would not cultivate it any longer because their losses were such that they could not make a living for their families. I lost that season upon my place a thousand bushels of corn. For three years after that time I was

Testimony of J. G. Smith.

unable to even rent the ground, as persons would not rent land and run the risk of losing their crops.

In order to protect myself I built an independent levee myself for 160 rods along the west line of the same tract of land and put it 8 or 10 feet at the base and five feet high at my own expense. The result was that after I had entered into the arrangements and had spent between $1,000 and $1,500 in machinery, I had to mortgage a forty acre tract of land to meet my indebtedness and was unable in 1884 to pay my taxes, so my land was sold for taxes and the forty acres was foreclosed. I have not received damage from water since my levee was put up. Whenever there was any alarm concerning threatened danger of the Sny levee my neighbors around me dropped their work and went to the levee with their teams and such help as they had and we worked upon it to the best of our ability. That has been the universal practice ever since the levee was built. In many cases that year men having wheat on the bottom in the shock lost it be-
159 *a* cause they went to work on the levee. I don't know of a single instance where people on the bottom have not assisted and done all in their power to avert danger. I have passed over the levee before and since breaks and have always thought it was not high enough. I am familiar with the high waters of 1851 and 1858 and am satisfied that there was only a difference of a few inches on my land between the waters of 1858 and 1880. In 1881 the water stayed up over the bottom nearly all winter. At my place the river was six miles and a half wide. There is a bluff on the Mississippi near the river and it is always considered to be about seven miles from bluff to bluff at my place. I didn't consider the levee broad enough or strong enough. I urged my neighbors to assist in building the levee, believing we could make one that would answer the purpose, but the result has been disastrous and the levee has proved absolutely deficient.

On cross-examination witness testified; Examined by Gov. Palmer:

I am a defendant in this suit. I didn't sign the original petition but only the subscription for the preliminary survey. I had ten acres at that time in the overflow district and have no more now. Mr. Clark read the law correctly. What he read was in regard to the duties of the Commissioners, their power to make

those assessments and also the assessments for maintaining and keeping the levee in repair. I expected that a levee would be built that would protect my lands and Mr. Clark thought it could be done. It could be done at the expense of the land owners 160 *a* benefited according to the benefit received. The benefits were distributed among the land owners by a jury. It was understood that the bonds would be issued. I don't think there was anything said only that certain bonds would be issued for that purpose. I understood that nothing was to be paid until the levee was tested. I understood that money was to be raised and the levee built and it was to be substantially constructed from the money that would be invested in that way. It was said that it was not to cost over five dollars an acre for the construction of it and if it was found that it would cost more we had the assurance it would be stopped. We all considered that the levee was insufficient and incomplete at the time the work was abandoned and the contractors quit. They all said it was too weak and flimsy to withstand the waters of the Mississippi river. My opinion is that it was not high enough to answer the purpose for which contemplated at the time it was completed. I thought it needed building higher, wider and stronger. There was some tracts of land to my knowledge that were bought by parties at a very small figure per acre. Of course after the levee was built these parties asked a higher figure than they paid for it. I know of lands purchased for 15 cents an acre and there were parties that had land in possession for taxes. It was afterwards held at ten dollars an acre, but it is lying far away from the river where it would not be subject to an ordinary rise of the river and a great deal of the land belonging to unknown land owners.

161 *a* Re-direct.

In my neighborhood there was a considerable majority of those opposed to the levee because they had no confidence in it and didn't believe a levee could be built that would answer the purpose. I think none of those opposed to the levee signed the petition.

Testimony of Thomas J. Fesler.

Thomas J. Fesler, examined by Thos. Worthington, testified as follows:

I live in Rockport, Pike county, Illinois, and have lived there about thirty years. I came there in 1852 or 3. I have been a merchant and justice of the peace there. I owned land in the levee district and was acquainted with the levee at the time of this original construction. Was present at the meeting held by Mr. Clark and Mr. Chamberlain. Mr. Clark made a talk to the people and said the object was to build and maintain a levee, and also stated the benefits which would be derived from it. The object of the meeting was to get up an organization. After the organization was effected money was to be raised by assessment. I understood the assesments were for building and maintaining a levee. We were to get up a drainage system and levy an assessment for the purpose of building and maintaining a levee. It was to be paid for by assessment upon the lands in the levee district. Mr. Clark had a copy of the law with him and read and explained it. I supposed from his representation that the system for maintaining the levee was the same as the system for constructing it and the cost of constructing and mainaining it would be levied on all the lands in the district according to the benefits. The 162 *a* construction of the levee without a system for maintaining it would have been of no value.

I didn't sign the original petition. If there had not been an understanding among the land owners with reference to the manner of building the levee I would not have gone into it. I know the sentiment of the land owners upon the subject at the time, and their idea was that there was to be an organization maintained by assessment for building and maintaining the levee. I understood that the law under which the levee was built was, in 1876, held to be invalid. I was along the levee while they were building it and after it was built, and have been acquainted with it ever since that time, and owned land in it. It was not high enough to turn the last water that we had.

I don't know how high the water of 1851 was, but I understood it was higher than that of 1888, and the water of 1888 ran over the levee, and we had to put planks and sacks on it. I have seen the levee when the water would have run over it had it not been for artificial means put on the top—some a foot high, some more. From what I know of the levee it was not strong enough

to resist the waters of the Mississippi river and it gave way in many places. There was a break in 1876, two or three in 1880, breaks in 1881 and 1888. Testimony Thomas J. F.

Immediately after the levee was constructed, and before it broke, lands advanced in value. After the break of 1876 they hardly had any value; you could hardly sell a piece of land. I was acquainted with the values of lands prior to the construction of the levee. After the levee broke in 1876 lands went back
163 *a* to about where they were before the levee was constructed; it was not worth anything. It could not be sold, with the improvements added, for the selling price before the building of the levee. I owned 540 acres in 1876 and 1881. I sold some in the fall of 1881. I offered it for three dollars an acre, and also offered to sell it for what it had cost me for fences and clearing. My neighbors understood the offer I had made, and one advised me not to do it, but I never had an opportunity to sell at that figure. All was for sale, but there were not any buyers. I think my offer was a fair representation of values in my neighborhood. My lands were a mile and a half or two miles from Rockport, where there is a railroad station. The break of 1876 ruined the crops and fences; they were all washed away. I lost nearly 200 acres of wheat which would have gone thirty bushels to the acre. I think my loss that year altogether on my lands was from $6,000 to $7,000. I lost every thing but the land itself. It broke up some of the tenants and I could hardly get a man to go back there. I know men who have been farming on the bottom who are poorer to-day than when they went there. I know many years the losses would over-balance the gains. This statement refers to the land owners as well as the tenants.

Prior to the breaks the land owners and tenants, and the people in general, turned out on the levee; we hauled brush, and dirt, and did everything we could; we used a great many sacks, more now, however, than at first. I remember one time, in 1880, of working myself three days and three nights, and
164 *a* never laid down; that was the case with perhaps a hundred working right there at the time. At a time when the levee seemed in danger, the water would work through it; that was where the pits were taken out on the land side; it would go through on the side of the levee so you couldn't walk over it, and would slough off in places.

timony of
mas J.
Fesler.

Witness, on cross-examination, examined by Gov. Palmer, testified as follows:

I bought my land in 1874-5. Part of them were in the name of my wife, Irene Fesler. One piece cost me $5 an acre, another quarter-section, the north-west quarter of section 24, 6-6, cost me $400. After the levee was constructed, and before a break, I suppose I could have sold the $5 piece at $10 and the rest for $4 and $5 an acre, perhaps as high as $8. I have sold it since that time; I got a little less than $11 an acre for it; it was all in cultivation. At the time Mr. Clark and Mr. Chamberlain were there I owned no lands in the bottom. I was friendly to the enterprise and thought I would go into it and get some land in the bottom. Major Clark had a book with him and read the law from it and I paid pretty good attention to it. I understood the money was to be raised by assessments in proportion to the benefits. Probably a jury was to estimate the benefits.

At that time the belief was that a levee could be built that would protect the lands. If I remember right he said it would cost about $500,000. I think the talk was that they would use bonds to raise the money; I understood that there would he sub-
165 *a* sequent assessments to keep the levee in repair. I bought my land after that on the faith of the prosecution of the levee.

Nothing was said about assessments in the deed; I knew the assessments were on the land when I bought it, but did know the amount. I bought the land which is in Mrs. Fesler's name, but she furnished the money; she understood all the circumstances. I went in there and went to work with the expectation that it was a protective levee; I put my money there, and labored and worked in mud and water and tried to improve the land, grubbing it and fencing it. Immediately after the construction of the levee and before the break of '76, there was quite a boom in land; it got up to a good price, probably as high as $10 or $12 an acre. The advance in land before the break was fully equal to the amount of the assessment. The break was caused by a weak levee. I know the levee was insufficient from some cause; I think in some places there was rubbish in it; that invariably causes leaks. I saw a stump about eighteen inches high hanging right on the edge of the break, where it broke through; I can't say it caused the break, but I know it weakened the levee. I was on the levee the day before the break of

1881 and the water was coming under the levee and I understood it washed a stump out but didn't see it. The stump that I saw was in '76, the 17th day of April. Whenever there was an intimation of danger people turned out to protect the levee. Prior to 1876 the people did nothing in preparing for danger until the water got up and became dangerous. We supposed the levee would hold 166*a* and thought it was all right. For four years after the break of '76 there was no break. In 1880 we had a fine crop, the best we had had. We lost nearly all of it. I signed the deed of trust with the hope that enough money would be raised under it to protect the levee. Between 1876 and '80 the gaps were all filled. I don't think there was any general strengthening. I think some work was done on the levee to strengthen it under the trust deed, but that only lasted until the new organization came in. Between 1876 and '80 we had about all we could do to mend the broken places. We didn't do any work systematically along the levee; we had all we could do in repairing the breaks of '76 and '80. It was done by voluntary contributions. We didn't do any more because we hadn't any more funds to work with. We lost our crops and the land-owners and others were disappointed.

Testimony of Thomas J.

Re-direct examination.

I bought some land at $5 an acre in 1873 and 4, and that land would sold for about ten dollars an acre prior to the break of 1876. One piece I paid $5 an acre for and the other I think I paid $400 for the quarter. The one paid I $5 for would probably have sold for $12 or $15 and the other $800 or $1,000. I had cleared some of it before 1876 and had broken the original sod. We pay $1.50 to $2.00 an acre for breaking. I had not broken and fenced the land I could have sold for $1200 or $1500 and the house on it was not worth much. I afterwards offered this land for $2 an acre, the whole thing. In clearing, improvements and fencing I probably spent more than $3.00 an acre on it. After the 167*a* break of 1876, we had a few years when there was no very high water. The levee didn't have a very severe test until 1880. Although the water may have been up sometime. A strong effort was made, but I don't think enough funds could have been raised more than sufficient to repair the breaks. There was no law in force by which any assessments could be made on the land. The trust deed was a voluntary matter and had no connection with the levee organizations as a drainage district. It was an organization by the land owners. In addition to the money spent under the trust deed there was some voluntary work put upon the levee but the people in the district were in general terms, in a poverty-stricken condition.

Testimony of William H. Raftery.

William H. Raftery, examined by Thos. Worthington, testified as follows:

I live 3 1-2 miles west of Pittsfield, Illinois, and own land in the levee district, section 1, 7-6. It is about a mile and a half north of the Louisiana Ferry. I am acquainted with the Sny levee and have been over it partly. I was over some of it in 1888 before it broke and I was over it a short time afterwards. The water was coming through the levee in various places. Most of it was at the base of the levee, it often reached up part way on the levee. I saw the break of 1888 a few days afterwards and also saw it after the water went down and it was perfectly dry. I examined it carefully with the expectation of making a bid on the work in the fall. There was a very small amount of the original soil at that place, it had been washed out. It presented an almost level surface where the levee had stood. I remember particularly seeing a very
168 *a* large stump about the center of the levee down under the break. It stood up 3 feet above the surface of the ground. This stump stood about where the center of the levee had been and hadn't been washed out. I didn't see any other stump there. The break was some 300 or 400 feet long. After the break of '76 you could not sell land for half of what it would have sold for before. There was no demand for Sny land and no sales made that I know of until after the new organization. The water took everything so far as I know inside the drainage district. No crops were left. In sheltered places fences were left but where exposed they were swept away. In the region between Rockport and the river I don't think there were more than ten per cent. of the fences left in 1876, and they were in sheltered places in the timber.

On cross-examination, by Gov. Palmer, witness testified:

I am one of the defendants, have been served with process. I bought my land in February, 1875, of J. D. Rupert. In my deed I agreed to pay the levee taxes and assessments. I paid $20 an acre for a half section. After the new organization was made and the levee repaired values went up some more. Prior to the break of 1888 land hadn't increased very much in value. I should suppose land was worth, at the time of the first break, on an average of $10 an acre. After the break it wouldn't sell for more than 50 or 60 per cent. That state of facts continued until we reorganized and after that prices were a good deal better. I believe I

signed the trust deed, although I am not certain. I signed the petition for the organization of the present levee district. I 169 *a* suppose the average value of lands in the bottom now would be $10 an acre. Some would sell for perhaps $25, and some for less. I bought lands upon the faith of the levee and went there believing the levee was a safe one. I knew my lands were subject to the assessment for benefits and I lost my faith in the levee as a protection. I knew nothing about the construction of the levee, but I know that it wasn't strong enough. I have been told that in 1888 there was about 4 miles of the levee the water ran over. The breaks were not very extensive. I saw a stump in one of the breaks, the place where the levee had been removed; it was close to one end of the break about the end of the embankment. My impression is that the break was 300 or 400 feet long, and the stump was close to one end. I don't know whether the stump caused the break or not. There might have been a little dirt washed out, but it was a small amount if any; it looked to me as if the levee had been taken off clean. Don't think I heard that the stump caused the break. There was nothing to indicate to me where the break commenced.

Testimony of William [illegible] Hall

Re-direct:

The break to which I refer was on the Rupert place on section 6 about 2 miles above the Louisiana Ferry landing. The general appearance of the surface of the ground where the levee had stood was level.

Following testimony taken by A. G. Crawford on behalf of 102 contain defendants represented by Orr & Crawford.

Z. T. Webster, examined by A. G. Crawford, testified as follows:

Testimony of Z. T. Webster

170 *a*

I live in Pleasant Hill township northwest of the town of Pleasant Hill and have resided in that neighborhood since 1848 with the exception of some seven or eight months in 1881. I lived there when the levee proceedings were commenced and owned land at that time, probably 400 or 500 acres. I knew about the circulation of the original petition, but didn't sign it nor the trust deed of 1876. I opposed the district in that I didn't go into it as a great many others did. I couldn't see wherein I was to be benefited. I kept up my opposition by taking a case to the Supreme Court, and in that case they held that this assessment

Testimony of F. Webster.

could not be levied, and the law was unconstitutional. I was always opposed to the levee from the beginning. I farmed all of my land before the levee was built. My land was situated right on the high water line of the '51 flood. I had some land in section 20 and some in 17, 18 and 19 in township 7-4. I bought these lands in 1858 and was engaged in farming them before the levee was talked about. I farmed them up to 1881 and then sold off a part of them. So far as farming those lands is concerned the levee never affected them. I don't think the farm worth any more to-day than before the levee was built or talked about. I don't know but what the lands would have brought more when the levee was first projected than to-day. The levee has never been of any benefit to those lands and never will be until they make it more successful than it has proved to be.

On cross-examination, by Gov. Palmer, witness testified:

I bought 160 acres of my land of A. Mozier in 1857 and moved on it in the spring of 1858. I paid $3,000 for 160 acres when I bought them. I bought another piece, the northeast of section 19, 40 acres, and a couple of small pieces of bottom land for 171 *a* which I paid I think $350 or $400. I bought 80 acres somewhere in 1862 or 3 and paid $1,200 for it. I bought another 80 about 1871 and paid $3,000 for it. They were subject to overflow by the 1851 flood. They were not overflowed at any other time except a small corner. The first I knew of the levee enterprise Mr. Clark and Mr. Chamberlain called on me at my farm and spoke to me about it. He said he thought it would be a good thing. He said he was going to have a meeting at Pleasant Hill. I went over and attended the meeting. There was a good crowd there. I presume he referred to the law at the meeting but don't recollect his reading it. Mr. Clark wanted to get some kind of a subscription to raise funds for a preliminary survey to find out what could be done, and desired those present to take stock in proportion to the amount of land they represented at the rate of five dollars a share for 100 acres. I didn't take any stock. I don't think he had this petition to the county court at the time. I never attended any other meeting and never signed anything or gave money to establish a preliminary survey. I was informed that the preliminary survey was made and recollect that it was reported to be successful. I never appeared at court until after the finding of the jury. I made complaint before the jury. I appeared before the jury at New Canton and objected to certain things. I presume I had learned what my assessments were at the time. I called Mr.

Corthell's attention to certain errors. I told him I knew there was a mistake in his plat and called his attention to it, where 172*a* he had thrown out land that I knew should have been kept inside the levee district. I was familiar with the lines and knew it had been under the flood of 1851. I knew that contracts were made for the construction of the levee and I supposed it would be constructed by the issuing of bonds, but I didn't know. I supposed my land would be assessed to pay part of the bonds and that the bonds would be disposed of to the contractors or to get money to do the work. I never took any steps to arrest these proceedings except to take an appeal to the county court. I was never notified by the county court to appear to contest the assessment. My appeal stayed there for more than a year, a year and a half, may be two years, and was then taken up and dismissed. I knew the levee was completed as far as it had gone by that time. I always supposed my lands were higher than the levee. Afterwards a demand was made upon me to pay assessments and I resisted them and that case went up to the Supreme Court and I succeeded. The trouble was the survey and plats didn't show my land was above the high water line. Then they made a back water line running 12 miles from the lower end of the levee and whenever that back water crossed the head water line it reduced the value of the land one half. They gave me the benefit of the back water line right where the head water line should have been and made it that much better on me. There were two lines of danger, one from direct overflows and one from backwater.

Testimony of Z. T. Wells

Re-direct.

I appealed from the assessment of the jury and for some 173*a* informality it was thrown out. I then took it up by injunction to prevent them from collecting the assessments on my land, and continued contesting these assessments against my land until I got a final decision.

F. L. Zerenberg, examined by A. G. Crawford, testified as follows:

Testimony of F. L. Zerenberg

I reside in Pleasant Hill, Pike county, Illinois, and have resided there since about 1834. I have been in business there for 15 or 20 years. I am well acquainted with the whole Mississippi bottom there through township 7-4 and 7-5 in Pike county and 8-4 and 8-5 in Calhoun county, and have been over it frequently during those years. There was very little difference as regards farming in

mony of Berenberg

the bottom in township 7-4 before the levee and since. They farmed there a good deal before the levee was built in what is known as the Sny Levee District. They had about the same success before the levee was built as now. The river bothered them occasionally then and the creek bothers them more now. The farms which I remember which were in cultivation before the Sny levee district was formed and before the levee was built, commencing on the east side, are first Hemphill's, Venable, Ferguson, Ruyle, Barnes, Dr. Uplake, McCullen's, John and Alexander Hemphill on the east side, Ferguson on the west side, and Turnbull, John McCullen, Billy McCullen and others. Thomas bought about the time the levee was built. The Henry lands, the Brawleys, the Jackson land, Jacob Turnbull's, the land of the Berry family, Clover, Farness and Frank and Dominick Lester. The lands of Dr. J. A. Thomas, S. S. Thomas, Perry Wells, Z. T. Webster and Dr. Morris, these lands were farmed about as successfully
174 *a* before the levee was built as afterwards. There was very little difference that I can see. The lands between Six Mile creek and Bay creek and along both sides of Bay creek can not be farmed as successfully now as they could before the levee was built. The east side of the creek is leveed against the creek, not against the river at all, out the levee breaks every time the creek gets high. The west side of the creek has been running over there and cut the lands considerably. It has grown up into a wilderness where there used to be good land and is now almost worthless. I am of the opinion that the lands would not be worth as much to me as before the levee was built for farming purposes. There is a great deal of Ross township south of the C. & A. Railroad which was not of any account before the levee was built and has just about held its own. It would be subject to back water overflow if the levee was forty feet higher than now and would not keep the water off anyhow. Part of the Rodhouse and Lovett places were farmed successfully before the levee was built. I don't think they are worth more than they were before the levee was built, taking the improvements and the expense of putting them in cultivation. I am acquainted with lands in Calhoun county. They are subject to back water and when the river gets high it catches them anyway, and sometimes when the river does not get high they are overflowed by heavy rains from Bay creek and the whole drainage district throws water on them. These lands are a great deal more subject to overflow since the levee was built than before.
175 *a* Bay creek is just east of Pleasant Hill about a mile and a quarter. It is ten or twelve miles to the head of the bay where it enters into the bottom. In places the creek has entirely

left the old channel. I don't know but that they are cultivating it in places where the old creek used to be. Before the construction of the levee Bay creek had a very large deep channel, as far back as '58 the channel was probably 15 feet deep. I know there was a great deal of talk about the organization of the levee district but never charged my mind with it. It was generally opposed by the land owners in the bottom about Pleasant Hill.

On cross-examination, by J. M. Palmer, witness testified:

I own no lands in the levee district and have taken no part in the operations looking towards the construction of the levee. Bay creek enters in to the bottom about 10 or 12 miles from the lower end of the levee. I don't just know the cause for the creeks overflowing. I am not accusing the levee of being responsible for their overflowing the land that didn't overflow before the levee was built. All creeks in the levee district are filling up as the country improves. I don't know whether the levee is responsible, but it occurred since the levee was built. Of course rough lands as they become cultivated cause more washing and they wash the land down on to the low land and it stops there. The creeks rise higher because they fill up in the bottom. The improvement of the country may cause a more rapid precipitation of the water in the creeks until it strikes this level bottom then it creeps off slowly on account of the flatness of the bottom. I can't say that
176*a* the levee has benefited the country much because most of that country that I am speaking of the water comes around the lower part of the levee and comes back on to it, and then we have all the drainage from the upper end of the district to come down and meet that and there is no way to get it out until the river falls. The levee protects us some from the overflow of the river; it is embraced in the present Sny Levee district.

Re-direct:

Before the building of the levee there was a current of water down the bottom, from the river and creek both; since then the levee backs up the river, and when the creeks get high from the floods above and join the dead water it causes drift and everything to settle, and causes a kind of dead-water. The natural tendency when the creeks got up because of the sediment, wood and logs was that it stood in what the creek was, and not only in the creeks but out in the bottom lands; since the building of the levee this creek is filled up with drift.

timony of
muel Long.

Lemuel Long, examined by Thos. Worthington, testified:

I reside in Calhoun county, Illinois, within or near the levee district, and have lived there since 1856. I was acquainted with the values of lands in that region before the levee was built. I live in the north end of the county, two miles north of Belleview, in section 12, 8-4, in the lower end of the district; some of my land is at the end of the levee. I am acquainted with the lower end of
177 *a* Pike county, in the district, also. The lands were not worth but very little, and were used for pasture, and they are the same way yet; my idea is they are not worth a dollar more. I don't think you could sell them at all. There are not but two men that want it, and they don't know much about it, as they live in the lower end of the county. I have never seen the levee in times of high water except down at my place. The water never comes as high as the levee on the outside down there, for the reason that there is a large bottom on the Missouri side and it spreads out; it has never broken down there, only from the inside out; there were many breaks of that kind in that region. I worked with my teams, for pay, upon the breaks; we worked there for five months and five days. Some of the breaks were twenty-five feet long, some of them three hundred yards. There were ten or twelve of them, altogether, from Clarksville down.

The land was all covered in 1892, and 1893 by water coming around the lower end of the levee. The levee didn't break, but was all under water, with the exception of a little bit. My land, and the land immediately joining, is not worth more than it was before the levee was built. I knew the Jennings land, only a half-mile north of me, and the same statement applies to it. Our wish is that when the water washes up it may wash the whole thing down so they will never try to build it up again.

On cross-examination, by Gov. J. M. Palmer, witness testified:

When it breaks above it causes two or three feet more of
178 *a* water than we would have; we have the worst overflows when it breaks above. The water comes down over us when Murphy's Bay, which is a little over a quarter of a mile wide, and the canal leading from it and everything has filled it up, and the water can't get out, and it rises and runs over out at the bluffs, where we live.

The levee didn't break last year, but drowned us out anyway. The levee is not connected with the high lands at the end. If the opening for the water was filled up it would protect us, if it came

Testimony of Lemuel Long.

up a piece. We have never suffered there from water coming directly from the river, because it always broke above and the pressure has been out. I live on the bluff, two miles north of Belleview, and part of my land is not subject to overflow.

I don't know anything about the plans for the construction of the levee. I first learned of it after they began to build it. I am in the Sny Levee District; I never signed any petition; I have not paid any taxes. I didn't intend to fight them if I could help it. None of us down there in our neighborhood are paying. I knew of the construction of the levee when it was going on. Nobody ever came down there to talk to us about it; the first we found out the people of Calhoun had to pay for it was when they came for the taxes.

When they were building the levee we inquired as to who were doing it all and all we heard was that Calhoun was to be left out, and we didn't bother ourselves about it. I saw them constructing the levee, and no man knew what the object was. We were 179*a* against it because our land down there was made a drain for the balance. At that time I didn't own any land in the district; I now have 300 acres. I got some from my father's estate.

My father never signed any papers; he was always bitter against it; he was in the fight when they beat it in the Supreme Court. I never paid much attention to it, but I know as a fact there was a dispute about the taxes, and that is why my father was opposed to it; I knew people had taken possession of the levee and we have been fighting them ever since they did it; they have been assessing us, but we have never paid it. Before the levee was built a neighbor and I bought, down there, 1,400 acres, and we paid $4,000 for it; when he died I bought his part for $1,000, and put on $1,000 in improvements, and I am about to sell it for $3,000 now, if I can. I was offered $2,500 for my share of it before the levee was built. It is the general talk that the land was never worth more than four dollars an acre down there, and it isn't worth as much as that now. The reason is, there was fine grass on it before the levee was built, and after that I broke it and tried to farm it, and never raised anything but weeds. It had been one of the best pastures in the world. It didn't advance any after the levee was built. I am a defendant in this suit.

mony of
el Long.

Re-direct:

When the levee breaks at the upper end of the district the water comes down and piles up over our land. We are not afraid of the Mississippi and never were before the levee was built, 180 *a* that is, not afraid of it then, but we are now when the levee breaks and if the levee doesn't break it backs up on our land about the same; it backs up to Pleasant Hill. None of the lands that I know in 7-4 and 7-5 in Pike county are benefited by the levee.

mony of
S. Thomas

Dr. J. S. Thomas examined by A. G. Crawford, testified as follows:

I live in Pleasant Hill and have resided there since 18[illegible] except some five or six years. I have been practicing medicine there since 1872. I have been well acquainted with the lands in the bottom south of where the C. & A. railroad now is since I was a boy. When I was a boy I was engaged in handling stock and was in the bottom frequently. I don't regard the lands in Pleasant Hill township as nearly as good for farming purposes now as they were before the levee was built. A good many of them were farmed before the levee was talked about. The lands which are now in the district and which were then farmed that I remember are the Hemphill tract, the Ferguson land, probably half a section; the M. M. Blake land, 160 acres; the Henry lands, Mrs. Busher's land, the James Venable land, Frank Hemphill land, the John Staley land, 160 acres; the Walker estate, some of which belongs to Mr. Arnold here now and some of it belongs to Mr. Higbee, I guess there is a section of that land, more than a section in the two pieces; Wiedman's land, Jacob Turnbull, Joseph Turnbull, the Perry lands, S. S. Thomas, Mr. Webster, Perry Wells, Logan, Strickhorse, Lovett and King. Martin's land and a lot of land belonging to Colonel Prince not fenced, some of 181 *a* land was not in cultivation before the levee was constructed.

Those I have spoken of were farmed before the levee was made, I think more successfully than now. We had one half section down there we quit farming and a good deal more we abandoned to the creek. We farmed it almost every year before the levee was built. Since the levee was built sometimes when we have back water we are about drowned out. It was so in 1892, when the water got over the land. There were two sections which

we farmed before the levee was built which we have since been unable to farm. The other lands we cannot farm as successfully as we did before the levee was built, to say nothing about the assessments. A large portion of these lands are worth less than before the levee was built to say nothing of the improvements. I don't think the Blake land is worth one-fourth as much as it was before the levee was built. It was considered a good farm before the levee was built with the exception of some wet land on it and that could be farmed some. I think the lands of John McLean, William McLean and Joe Ruyle were farmed successfully before the levee was built but they are not now as valuable for farming purposes. Before the levee was built Bay creek had sufficient channel to carry off the water so there were no overflows. I know lands adjacent to the creek that could be farmed every year, and now it overflows all the time and it takes the land between the two creeks almost, between Bay creek and Six Mile creek. Six mile creek had sufficient capacity to carry off its waters and didn't overflow before the levee was built. It now overflows continually 182 *a* when there is any rise. Before the levee was built the waters of Six Mile and Bay creek would carry off the drift and sediment coming down them and clear out the channel, but since then they have been dammed up and filled all the way up. When the river is up and the levee doesn't break the water backs over nearly all of this land. When the creek is up at the same time it meets the river waters and all the drift seeps right through and settles. I don't think the lands in the whole country I have spoken of are worth as much to-day as before the levee was built to say nothing of the improvements that have been spoken of.

Testimony Dr. J. S. T

On cross-examination, by Gov. J. M. Palmer, witness testified:

I own one piece of land other than that derived from my father's estate and have a half interest in another. I bought my land from Henry Yokem, section 23 in 7-5. I think my father owned about 800 acres of land in the bottom. His name was John A. Thomas.

I began practicing medicine in 1872. I think I first heard of the levee in 1872. I don't remember the date exactly. I was in Pleasant Hill in 1872 and '73. I have been an active practitioner traveling around in the neighborhood of this country and my father was a physician in full practice. I knew that the levee was being built. I knew the supposition was when the work was going on on the levee that it was to be paid for in bonds, and bonds were

Testimony of W. Thomas

to be issued and I supposed they would be sold to get means to construct the levee. I heard my father talk about it some.

183 *a* He was opposed to the levee all along and after he signed this petition he regretted it very much and tried to get out. I did my best to keep him from signing it. I think my father knew of the circumstances attending the plan, the levee and the method of raising the money. I didn't think it would be beneficial. My father became doubtful about it and regretted signing it in a day or two. He never withdrew his name to my knowledge. When I bought my lands I knew they were assessed. I was repeatedly down opposite Clarksville on the levee to see the sick there when they were constructing it. My father has died since then. I think if the levee was constructed ten times higher than it is we have land that would be overflowed whether the levee breaks or not, and I think the water stays longer on the land now than it did before we had a levee. The water backs around the levee and gets onto the land and the closing of the river front checks the return of the water to the river. Bay creek and Six Mile creek are filling up by deposit. It may be that streams on high lands throughout the whole country are filling up by deposits, but I think the levee is responsible for the filling up of these creeks. It is clear they are filling more rapidly than before, because I never knew them to overflow the bottom before the levee was put there. It is probably true that they are also filling up outside of the back water. My father went there in 1849 before the levee was built, the lands were covered with water when the river was high. We have a back water line and a high water line. Of course we got back

184 *a* water before the levee was constructed, that is water would back up when the river was high before the levee was there and it is the same thing yet. It is a much worse thing now, it backs up further and stays longer unless it accommodates itself making an opening at the lower end of the levee. I had to abandon some of my land because the creeks washed the crops away. Maybe they would come a dozen times a year, and the river would come once in 4 or 5 years. You can't do anything with land there now since they have kept the levee on the creek. I think Bay creek may be filling up some outside of the levee district, I don't know it of my own knowledge, and the same is true of Six Mile creek. Six Mile is not filling up after you leave the bottom where it comes from the hills, nor Bay creek after you get above Nebo, which is three or four miles above the levee district. I think it was about 1876 that I first noticed it. At the time of the suit about the bonds I didn't own the land then. At the time I got the land I knew there would be assessments for the new district. I had

been informed and understood that the law under which the bonds were issued was unconstitutional before I bought those lands. I think I bought the land in 7-5 in 1877 or 1878. I paid for that quarter section of land fifty cents an acre. I knew that bonds had been issued for the building of the levee and I knew they had not been paid. I thought they were defeated by the decision of the court. I got hold of this land after that suit was decided.

Testimony Dr. J. S. Tho

Re-direct:

185 *a* The statement that I have made with reference to injuries to land and the condition of the land in that neighborhood applies to the land belonging to the Jennings heirs and to nearly all the land south of the C. & A. railroad. The same applies to the land of Lemuel Long and to all the lands in Calhoun county.

A. F. Ferguson, examined by A. G. Crawford, testified:

Testimony A. F. Fergu

I reside in Pleasant Hill township in Pike county, Illinois, about a half mile from the levee district, and have resided in that neighborhood all my life. I have been acquainted with the greater portion of the lands in Pleasant Hill township and Calhoun county ever since I can remember. I was never over in Ross township very much only I used to ride for cattle over the land east of the Six Mile and into Calhoun. The majority of the lands in there have been farmed ever since I was a boy, and the lands that were not farmed before the building of the levee can not be farmed successfully now. I know the lands mentioned by Dr. Thomas in the district, and also the lands of Captain Lovell. They have depreciated in value since the levee was built, I think more than half. Names the land he knows the owners of. The 160 acres now owned by Mr. Scranton I think was valued at $6,000 in 1868 or '69. A part of it now has no value at all. The whole 160 acres was sold for $1,500 in the last year or two. I know the Fleck land. It was worth $2,000 before the levee was built. It has no market value at all now. The creek is over it from four to a half dozen times a year. In fact it was over it all through the crop season this 186 *a* year. Notwithstanding a levee is constructed along the creek the land is worth less than it was before the river levees were built. Between $6,000 and $8,000 have been expended in leveeing along the creek within a mile. Before the river levee was built the creek carried off the waters and since then it has been filling. Before the levee was built there was always a current in the creek that carried everything out no matter how full the creek

Testimony of J. H. Ferguson.

was by the head of the water, the back water as we called it then. The river carried a current with it and carried everything out. I know of a drift formed there in 1876. I saw the formation of the drift. The levee was built in 1875 and the draft commenced in the spring of 1875. It was an accumulation of small drifts that formed in the creeks for quite a ways up there as far as my place and on above there. It was there at the time the river was up. The back water was up from above Bayville right in the creek above what is called the iron bridge there but the drift was forced down until it got far enough down so when the flood came so the water could spread out on both banks and come to a level. The creek could not carry enough to carry the drift out, and it had the effect of throwing the water all over the land. The drift settled right down there. It was between two hundred and three hundred feet, the first drift that formed there and it has been accumulating ever since. Part of the drift had stopped opposite our farm and we thought it was caught there and undertook to loosen it, but found afterwards that it was not really caught but was held by the creek and the back water held the creek. It stopped the
187 *a* creek and sent its waters over on either side and the result was the creek could not carry it any further. Had there been no levee the current would have carried it on through into the river. We gathered there in large numbers and tried to devise some means to get the drift out but couldn't find any way it could be done. Since then the creek water has run all over the land. The statement regarding the value of lands now and before the levee, which I have made applies also to the greater part of the land in Calhoun county. There are some places on the east side next to the bluff, it doesn't apply to.

On cross-examination, by Gov. J. M. Palmer, witness testified:

My father's name was James H. Ferguson. He died in 1863; long before the levee was contemplated. I acquired my land from my father's estate. I never signed any of these papers or the deed of trust. I am in the present Sny Island Levee Drainage District. Twenty years ago, when the levee was being constructed, I lived right where I do now—southeast of Pleasant Hill, on the bluff. I noticed the construction of the levee after it commenced. I didn't know whether or not these lands were being assessed for these payments; I supposed they would be.

I opposed it all the way through. I met with the original

jury, at New Canton, and showed the reasons of my objection to the assessment. My objections were in regard to the back-water line; it didn't make any difference to me, for farming pur-
188 *a* poses, whether the water was a foot deep or an inch deep—it couldn't be farmed with water on it. I was, at that time, according to Mr. Corthell's plan, in the back water district. I didn't see any of the parties prior to the building of the levee, but the object of the levee was to protect the land from the river-water, and, according to the engineer's statement and my own knowledge of the thing, I knew the water would be compelled to come down over the land. There was no back water before the levee was built; it was produced by the levee, and my damages were assessed upon that basis.

Testimony A. F. Ferg

We, as a body, appealed from the jury, but that was all there was of it. Independent of the river, I am suffering from the overflow of Bay Creek. There was none to amount to anything before the levee was constructed. Bay Creek empties into Hamburg Bay, and the great drift I have spoken of is about seven miles from there. The bottom of the creek is filling up below the drift for about a half mile. It is true that some times in dry seasons there is no water in Bay Creek. When I was a boy I lived near the creek and it was a good deep stream, but once in a while it would run low in the latter part of August, but there were always holes in it. It used to be as low as it is now. It is dead water, apparently, a little below the bridge; the drift and mud together furnish a dam that makes the dead water. We have tried to remove the drift, and it has been fired four years. The drift is seven miles above the mouth of Bay Creek. The drift has been there since 1876. There
189 *a* was an effort made, or commenced, in the fall after it was formed in the creek to take it out; it was then two or three hundred feet long. I think it is now over a quarter of a mile long. The creek has abandoned the old channel, but has not cut as deep a one as the old one.

Re-direct:

There is, really, no channel at all; it is about twelve feet wide and seven feet deep. Before, it must have been sixty feet wide and fifteen or twenty feet deep. Now it hasn't a sufficient channel to carry one-tenth of the water. We were affected by back-water from the river before the levee was built. We were told positively that we would not be protected from back-water by the building

Testimony of J. Ferguson

of the building of the levee. We had nothing of this back-water over our lands before the levee was built.

I was opposed to the levee, and the levee assessments, and all the people down there were just as I was. We were all the time in a suit of some kind, trying to get what we considered our just rights. In paying the assessments, we have always done it under protest, and because we were compelled by law and not because we were benefited. We went before the jury without an attorney and objected to the assessments. All did their part in furnishing means to aid our cause; in every instance we all did what we could to resist the suit and all the assessments against the land.

Testimony of Frederick Wiedman.

Frederick Wiedman, examined by A. G. Crawford, testified as follows:

I reside in the Sny Island Levee Drainage District, below 190 *a* Pleasant Hill, on section 32, 7-4. I came there in 1869, and have lived there ever since. I never signed any papers to form the old levee; I was never much in favor of it, and I did not find anybody else around there that was. There was just as much land farmed before the levee was built as now. I am acquainted some, as far as the C. & A. Railroad and down through the district in Calhoun county. These lands were not as much affected by the creek before the levee was built as they are now. I think we had a little better crops before the levee was built than we have had since. I don't think my land is worth as much since the levee was built as before; we can't raise as good crops now as before.

What I have said concerning my land applies to the other lands; they are all worth less than before the levee was built. I don't know about Bay Creek, but Six Mile filled up; it brings down back-logs and drift that stops the water there at the mouth; it never formed that way before the levee was built.

Before the levee was built the Sny was two hundred feet wide, and Six Mile ran into it, and the Sny into the river about a mile below the mouth of the Six Mile; but now the levee has cut off that outlet. When the drift comes down the Six Mile now it forms right in the mouth of the Sny, because there is no water to carry it off. Before the building of the levee the Sny had a continual current; now it goes right down into the Sny and that is the end of it. Where the Six Mile went into the Sny before the levee was built it was about thirty-five feet wide and was sixteen or eighteen

191 *a* feet deep. It is now about ten feet wide, and I don't know how deep it is; there is just a little gutter where it can get out.

My lands are effected by overflow of Bay creek and back water, sometimes all at once. That applies to all the lands in that section.

On cross-examination, by Gov. J. M. Palmer, witness testified:

Before the levee was built the land was worth more than it is now. There used to be 15 feet of water in it and we had a flat boat on it to haul posts and rails. It has filled up so large trees can grow in it. It began filling up after the levee was built. The trees growing there are some 12 or 15 years old. Some of them are a foot around. The Sny is full of drift at the mouth of the Six Mile, brought in by the creek and Six Mile is filled up too. The levee is about a mile and a half from Six Mile. More land is fenced in now and cultivated than used to be. The washings in the creek come down from the hills, that is brought in there and is filling up the creeks and the Sny. I never signed any of the papers. I worked on the levee sometimes for wages and was paid for it. I live about a mile, in a straight line, from the levee. I knew the levee was being built, but didn't know at the time that my land was being assessed for it. I didn't know at the time how the levee was to be paid for. They told me it was being built to keep the river out, but nobody ever told me how it was to be paid for until sometime afterwards when they came around and wanted some money to pay the taxes for building the levee. There were 192 *a* a great many men and teams working on the levee and I supposed somebody had to find the money to pay them and I thought probably the land owners would. I bought my land first in 1868, 80 acres, I bought 16 acres afterwards. I reckoned that my land would have to pay for some of it but I never inquired how much. I have paid levee taxes ever since they started to collect them. I got receipts for all the taxes I paid. I never knew how much they charged my land with. I took no part in the matter one way or another.

J. E. Jennings left out.

mony of
rick
Wiedman

Re-direct:

I mean I have paid levee taxes since the present organization commenced, I don't remember whether I paid 18 years ago or not. I paid $700 for 80 acres. I don't think I could get more for it now with the improvements on it. But don't want to sell.

mony of
Galloway

A. L. Galloway, examined by A. G. Crawford, testified:

I am sixty-three years old and have lived for sixty years within two miles of Pleasant Hill in this county. I am acquainted with the Mississippi bottom in township 7-4 and township 8-4 in Calhoun county and have known them ever since I can remember. Lands were farmed in a measure successfully before the levee was built. Once in a while they would meet with water. There were a great many farms there.

(Witness here enumerates the lands named by Dr. Thomas and others.)

My opinion is that these lands were farmed more profitably before the levee was built than they have been since. I don't think the land in the bottom has increased or enhanced in 193 *a* value on account of the building of the levee. Land is not as high in that locality as it was before the levee was built. I was acquainted with Bay creek and Six Mile creek before the building of the levee and I don't think there ever was a time in my history that the channel of either of the creeks would carry all the water that would come in big freshets. When it struck the bottom lands it would run over the banks to a considerable extent, it has always done it. Before the building of the levee the channel of Six Mile was deep and carried off all the waters except those high freshets that came once in a while. I have farmed all along Six Mile creek since 1844 and never lost a crop by virtue of the water. Since the building of the levee when the creek gets up it takes the whole bottom down there. The channel has been filled up the last ten or twelve years to a great extent. Before the building of the levee I am sure it carried the water. I know it didn't run over my land then and it does now. Sometime prior to the building of the levee it was a fine channel. Steamboats could run up some distance. I can't say when it commenced filling up, our lands were not bothered with it before 1876. Since that time Bay

creek has run over all the adjacent lands. Before the levee was built the Matthew Scranton land was assessed at $40 an acre. I was one of the appraisers and it was worth that. Now I wouldn't give $20 for it. I know that 80 acres of it sold for less than $25 an acre within a few years. The land owned by M. M. Blake isn't worth one-fourth as much as it was before the levee was built. The land of Joseph Turnbull is rendered about worthless by the creek. It was farmed before the building of the levee, now it can't be farmed but a little. Since 1876 all these lands have gradually depreciated in value. There was always a swift channel in the river before the building of the levee when the creek joining it would still go on with the river water. Since the building of the levee there is a great deal of back water over these lands around the lower end of the levee and backing up. I owned some lands at the time the levee organization was first talked of. Captain Lovell bought in 20-21 in 7-4 below Pleasant Hill. These lands and the lands of Perry Wells lying north of the railroad are not worth half as much as they were before the levee was built, but whether the levee causes it or not I can not say. In that locality the levee is not any benefit, could not be. The building of the levee was generally opposed by the land owners down in this township. I don't know of but two or three men who favored it in the whole district we have been talking about. They were S. S. Thomas and Jacob Turnbull. Dr. J. A. Thomas was afterwards opposed to it. The people in that locality didn't favor the present drainage district and didn't sign any petition that I know of. When the levee was broken we held a mass meeting and all the land owners attended. I went to Hannibal and introduced a resolution there asking the parties to discontinue the levee entirely. We objected to any more assessments from the fact that we never have received any benefit and were tired of it.

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On cross-examination, by Gov. J. M. Palmer, witness testified:

I can not fix the date of that meeting, but it was as far back as 1880. They determined to rebuild the levee, but not while I was there. I am, I presume, 12 or 15 miles from the lower end of the levee. I live five miles from the nearest point on the levee. I had 120 acres in the levee district at that time which I had owned a number of years. There had been a scheme to build a levee gotten up by a man named Leonard a good many years before. I think I heard in 1870 or '71 of a movement to get a law passed to authorize the building of levees. I knew Maojr Clark, met him one

Testimony of J. Gallowa

night in Pleasant Hill when he was surveying for the levee. I recall several public meetings there. I think I heard some organization was attempted with a view to making arrangements to pay the expenses of a preliminary survey. I heard they were taking steps to organize a levee drainage district. I can't say that I knew a petition was being prepared to be presented to the county court. I heard the fact of the appointment of commissioners. I think I was acquainted with them. I understood there was to be a district organized to build a levee, but the particulars I don't recall. My recollection is that funds were to be raised by taxation on the land. I heard there was a jury, but never met one. I have always been of the opinion that jury didn't go over much of the land. I knew they had begun building the levee. I saw them at it. I had no lands that were assessed. I say I had 120 acres in the dis-
196 *a* trict but they left it out. I suppose I am a defendant in this suit. I have 220 acres of land that I got from the estate of Thomas Jennings, 20 acres from William McLean, some of Z. T. Webster, George Wells and Jesse Long which are in the district. I knew they were in the levee district, and must have known that there was a levee asssessment on them. I didn't know whether the bond assessment had been paid or not. I believed that the suit of Webster had disposed of them. I didn't understand there was any assessment for the old levee on the land. We didn't buy it with the understanding there was any assessment or claim on the land.

I supposed the old district was passed and gone. They were quite a while in building the old levee and there were many men and teams at work on it. The levee has been no advantage to the lands I have named; when the river got high enough it came on the lands anyway—broke through the levee. Some of my lands are south of the C. & A. Railroad. Clarksville is about ten or twelve miles below Louisiana, following the line of the bluff. These lands are not protected from the back water—the levee is not arranged so as to prevent that; it terminates on the bank of Bay Creek, on what is called the Bay.

The distance from the southern end of the levee to the bluffs is about a quarter of a mile, and Bay Creek passes between the end of the levee and the bluff. It is through Bay Creek that the back-water comes up. There was some back-water before the levee was built; it always came up through. The heighth of it would depend on the heighth of the river—in extreme high water it
197 *a* used to run up as far as Atlas. There would always be a current—not the current in the river, but there would always

be in that water. We generally called it back-water, but it was simply a portion of the river running over the banks and out over the country. Testim... A. L. Ga...

On the southeast side of Bay Creek there is an abrupt rock bluff which extends around the whole bottom. Several miles below Pleasant Hill there is an opening in the bluff where Bay Creek comes through it, and there are other openings where other creeks come through it. Other streams come in all along the bluff. The width of the bottom ranges from four to five miles. The length of Bay Creek, from the point where it enters the bottom to Hamburg Bay, is about eight miles. Pleasant Hill is nearly opposite Clarksville, and is a mile and a quarter from the point where Bay Creek enters the bottom, and nine miles from the end of the levee.

Since 1874 Bay Creek has been filling up; I didn't to any extent observe that it was filling up materially prior to 1874. I believe the creeks are always filling up in that flat country—they are always undergoing a change. At Bayville I am acquainted with it, and there is no channel since the levee was built; they have spent hundreds of dollars to keep it from running over the farms.

Six Mile is a rapid creek—I should judge it runs about four and a half miles in the bottom—and enters the Sny. I don't know the exact distance from the mouth of Six Mile to the mouth of Bay Creek; I assume that it would be in the neighborhood of ten 198*a* miles. Six Mile is filling up so that in places there is very little channel, and it won't carry the water in ordinary rains, to amount to anything. Before the levee was built the Sny had some fall and a considerable depth; you could not cross it anywhere. I attribute the filling up of Six Mile entirely to the building of the levee, for it shut off the flow of water from the Sny, but all the creeks in this flat country are filling up. When the Sny was filled so there was no current it also affected Six Mile, which is a sluggish stream in the bottom. I never noticed it was filling to any extent until the Sny got filled up. Since the levee was built, when the water backs up, it comes over the land as it has always done when the river gets high enough. There is no current for the back-water inside of the levee, unless the levee should break. These creeks come down and throw into that water an immense amount of sediment, and it simply settles, but my lands which overflow are not covered by sediment. I have lands that are overflowed by both of these creeks.

ny of alloway

I know that some low lands contiguous to the streams get filled with sediment from the creek. I can't say as to whether the building of the first levee advanced lands in our neighborhood in price or not; I don't think it did; it didn't produce active sales. There was a flush of money several years ago and several farms sold at pretty fair prices, but I don't know whether the levee had anything to do with it or not. I remember a piece of land sold by Hulschlitz to a man by the name of Selby for several thousand dollars; it sold last fall for two thousand dollars. Lands are not as high as they were once there.

199 *a* There is considerable settlement south of Pleasant Hill, but I have not heard of any sales for the last year or two. The C. & A. Railroad affects this land to some extent when the back-water is coming up rapidly, but ultimately it goes as high above the road as below. It runs nearly a half a mile south of Pleasant Hill, thence in the direction of Louisiana. The C. & A. Railroad has nothing to do with the lands adjacent to Bay Creek, or the waters of Bay Creek. Louisiana is opposite Pike county, Illinois.

I have never signed any petition or deeds in connection with the levee matter, but have been fighting it all the time. I own lands in the new district. I have never taken part in any of the legal proceedings intended to test the levee. I paid my assessments under protest all the way through. I didn't receive any benefit, but thought it best to obey the law, rather than fight it. I paid reluctantly but filed no formal protest.

Re-direct.

The river bottom runs from the north-west to the south-east. Clarksville is south-east of Louisiana, ten or twelve miles below, on the banks of the river.

The railroad runs a little northwest from Pleasant Hill for a distance, then runs pretty square west. I think Louisiana is about west of Pleasant Hill. On the Missouri side of the river opposite this levee there is a high bluff coming abruptly to the river down to Clarksville. The river bottom is on this side from above Hannibal until you get below Clarksville. About a mile below Clarksville the bottom opens out on the Missouri side and at Hamburg
200 *a* Bay on this side the river strikes the bluff and the bottom is then on the other side of the river. The bottom is about as

wide at the foot of the levee from bluff to bluff as it is above, but it is on the Missouri side there at that place. Bay Creek runs into what is called the Bay 2 or 3 miles north of the end of the levee, or perhaps less.

Testimony of A. L. Crawford.

B. S. Jennings, examined by A. G. Crawford, testifies as follows:

Testimony of B. S. Jennings.

I am 45 years old, was raised in Calhoun county and am acquainted with the Mississippi bottom in township 7-4 in Pike county and 8-4 and 8-5 in Calhoun county. I lived until 1881 on section 1, 8-4 Calhoun county. The lands in these townships were farmed before the building of the levee in places and on high ridges and a good deal of it in the south part of Pleasant Hill township. Before the building of the levee Bay Creek had a good channel from the place where it enters the bottom down to the Bay. It was from 10 to 15 feet deep and would swim a horse for 60 feet across, when there was a freshet, it would carry off all the waters of every freshet which would occur probably once a year. In 1881 the channel of Bay Creek had drift in it; it hurt Pike county people, but helped people on the east side of the creek; it threw the water over on this side. The channel got on this side of the creek and went into what we called Goose Slough. Before the building of the levee the channel of the creek didn't fill up any, now it is filled up so that I drove across it a year ago. These lands were farmed about the same before the building of the levee as since, but up above there they can not farm now.
201 *a* There is more demand for land now than there was then. We used to rent our land those days and we got only one-third, now we get two-fifths or one-half. The crops are not any better than they used to be.

A. J. Lovell, examined by A. G. Crawford, testified as follows:

Testimony of A. J. Lovell.

I came to Pleasant Hill in 1856 and resided there until I moved here in 1876. Was well acquainted with Pleasant Hill township and 8-4 in Calhoun county. The lands there are not as good for farming purposes now as before the levee was built. The larger part of them in 1874 was farmed successfully except when there was an occasional high water from the river. Since the levee was built the back water gets on them. I was engaged in merchandise a good many years there. I think those lands

Testimony of Lovell.

have decreased in value since the building of the levee. I know of some selling for less money since than they did before, a majority of them are not as good for agricultural purposes as they were before. The Sny used to enter the river about a mile below the mouth of Six Mile at a place called the Cut-off. The levee has stopped the opening of the Sny into the river at that place. Flat boats used to run through the cut-off and up the Sny and up Six Mile pretty nearly to the bluff. Six Mile was of considerable width and depth; it has no width and depth now. The lands north of the C. & A. railroad in Pleasant Hill township were as good for farming purposes before the building of the levee as they are now. They are about equal in value to say nothing about the amount spent on them since in leveeing and ditching Six
202 *a* Mile which we had to do privately. The original construction of the levee was opposed by nearly all the people down there in the bottom and they have ever since opposed it.

On cross-examination, by Gov. Palmer, witness testified:

I mean to say they fought the levee and fought paying taxes on every occasion, a majority of them. I don't know that there was any opposition until an attempt was made to collect taxes. I saw Mr. Clark the first trip he made to Pleasant Hill. I didn't sign that petition and have not signed any of the papers connected with the levee project. I understood the money was to be raised to construct the levee by taxation on the lands in proportion to the benefits; it is my understanding that it was expected to borrow the money and issue bonds for the money. I knew that a jury was called to adjust the amounts. They came to Pleasant Hill and I saw them. I suppose I heard of the issue of the bonds, but I never saw them. They were not favorable to the levee at the lower end but no steps were taken to manifest resistance until an attempt was made to collect the assessments. I refused to sign the petition in the first place, but I paid taxes without making any special fight. Lands may have advanced some at the time the levee was spoken of, but I don't remember of any. The people generally knew that money was to be raised by assessment on their lands. I still own my lands; in the bottom the streams are filling up I suppose, the only ones I know. Didn't anticipate their filling up when the levee was built. My observation is that all the streams are filling up more or less. I first noticed that Six Mile was filling up about 1876. The Sny was a navigable stream before that and the closing of the mouth stopped it.
203 *a* Six Mile was navigable for flat boats and was used for it not a great while before the levee was built.

Re-direct.

By saying the people down there didn't oppose this assessment I mean they didn't go into court, made no open fight, but they were opposed to the system of levee drainage. They certainly thought they were not benefited any and if any assessments were made it would be on those benefited. I don't think the productive capacity of the lands there has been effected either favorably or unfavorably by the construction of the levee. Before the levee was built, and there was no overflow for three or four years, and good crops were being raised upon the lands, they would go up in value. I suppose I did know the assessments were made about the time the jury fixed them. The lands sold for more than they have since then. Testimony A. J. Le

Anthony Roy, examined by A. G. Crawford, testified:

I reside in Ross township, 7-5, in Pike county, Illinois, and resided there about 23 years, I live about two miles above the mouth of Six Mile. I was well acquainted with the whole country there before the building of the levee. At that time I lived in Calhoun county, six miles and a half from the mouth of Six Mile. Before the building of the levee the mouth of Six Mile where it emptied into the Sny, was deep even at the low stage of the water and the Sny itself was about 225 yards wide. Six Mile was from 25 to 40 rods wide. You could run up it with a boat four or five miles except in low water. It never affected the lands then except in very low places. The only place I know of was where it ran across the road into Crooked Slough. The building of the 204 *a* levee has caused it to fill up at the mouth where it discharges into the Sny. The building of the levee stopped the cut-off which was the opening of the Sny into the river. When it was open there was a current into the river and it kept the Sny washed out with a good body of water clean down to its mouth, so that as big steamers as we have in the river could run up there. It commenced to fill up the year the levee was built. The opening being dammed up, the water backed in and when Six Mile came to this, the sediment poured right in and as the current was not sufficient to let the water out of it, the mud settled right there. This place to-day, instead of being ten feet deep, is all ground and has big trees on it, willows and maples. It really isn't over Testimony Anthony

Testimony of Jas. Roy.

ten or fifteen feet wide where there is water until you get down to King's canal it is filled up full. I don't think the lands are worth as much, taking into account the amounts that have been paid as they were before. The building of the levee has not been of any benefit to the lands in that locality.

Cross-examination, by Gov. J. M. Palmer.

We can't produce anything on the lands on account of back water or big rains, the water can't leave until it overflows the Sny. Right at the mouth of Six Mile there is a dam and where it used to be ten feet deep it is now dry land. Right at my place, which is two mile from the mouth of Six Mile, there is a dam and about four miles above me there is one from another creek. The sediment in the bed of Six Mile extends pretty nearly up to the
205 *a* bluff, where it hadn't filled any to speak of. The Sny is filled up twelve feet with solid mud and dirt. The back-water comes up as far as Atlas. My lands are covered with back-water when the levee has not broken above. It comes in directly from the Mississippi river and the current runs up stream instead of down.

Testimony of Wm. Lovett

William Lovett, examined by A. G. Crawford, testified as follows:

I live in Ross township and have resided there since 1864, and before that lived in Calhoun county. I have been familiar with the Mississippi bottom in Ross township, Pleasant Hill township and Calhoun county since 1862. We had stock on the bottom and it was my business to look after it. I was acquainted with the bottom before and since the building of the levee. There has been no increase in the values of lands outside of improvements since that time. Lands which were improved before the levee was built have not increased in value since. Those that have been put in cultivation since have not increased any more than the value of the fences and houses and other improvements. There isn't much difference between them for farming purposes before the levee and now. You could farm the high points then and that is all you can farm now, on account of back water. I know Bay Creek before and it used to follow the channel right straight through. It has filled up a great deal. It spreads out a great deal now and has formed another channel. The water backs up and when we have an extreme rise from these creeks, above the levee

Testimony of William

being filled up across the cut of the Sny where we used to have 10 feet of water, and the canal in the cut-off in King's lake being of no width or depth, the Sny filled up clear past Six Mile 206 *a* and where we used to have 10 feet of water there are not 8 inches all the way up. We are affected now by river water coming round the end of the levee and also creeks coming down on it both back water and head water. I raised two crops out of three before the levee was built, but have not done so since. My father bought lands there in 1865. Those lands are not worth any more now than when he bought them. I bought land there six or seven years ago and paid $2.00 an acre for it. My father paid $10 and $15 for his lands in 1865. My father and the neighbors in that neighborhood opposed the levee. We refused to sign the petition and have opposed it ever since in all these fights because it has been of no benefit to our lands.

On cross-examination, by Gov. J. M. Palmer, witness testified:

I saw the petition circulated around there. It was a petition for a levee but I don't know who signed it. I owned lands then in section 13 and south of the C. & A. railroad. I rode along the levee while they were building it and noticed the way in which it was built and what they were doing in regard to building it. I noticed stump cut off at the top of the ground and they put dirt over them. I saw them at the lower end of the levee. I understood the levee was built by money borrowed on bonds. I didn't understand exactly how the assessment was to be made. We didn't appear before the jury. My father appeared in court to resist and was looking after my land also. My father attended the meetings. I can't tell you what was done, he was looking after that. We went into the bond suit the first chance we had 207 *a* to see whether they were legal or not. That was after an attempt made to collect them and was the first chance we had to defend ourselves. We didn't know there was an assessment on our lands for building that levee and as soon as we did find it out we tried to get out of it. I only knew that our lands were assessed by what I heard people talking about through the levee district, that is that they were going to assess five dollars an acre against the lands. I heard about the jury but what they did I couldn't tell. I never had any notice to appear before them.

Testimony of M. J. Thompson

M. J. Thompson, examined by A. J. Crawford, testified:

I live in Pleasant Hill and have lived there since January, 1876. Prior to that time, since 1870, I lived within half a mile of there. I had some acquaintance with the bottom at Pleasant Hill before the building of the levee and remember that lands were being farmed there at that time. I worked on the levee the first winter it began. Webster, Yokem, Thomas, Roberts, Mitchell and others farmed lands, before the building of the levee. Since then we tried to raise 5 crops and only got two. We farmed more successfully before the levee was built than since because of Bay Creek and Six Mile and back water. Before the levee the channels of these creeks were deep and wide. Now they are narrow. Six Mile will not average over 25 feet for 4 miles, and the channel of Bay creek is nearly filled up. It used to have a wide deep channel.

Now when a freshet comes it goes over the bottom 5 miles
208 *a* wide. These lands are not worth as much to-day as they were before the levee.

On cross-examination, by Gov. Palmer, witness testified:

I don't own any lands in the district and never did. I cultivated some land on the bottom last year. I was not farming in there in 1870, '71 or '72, but I was frequently down on the bottom. Took time for some people on the levee.

Testimony of Alexander Hemphill.

Alexander Hemphill, examined by A. J. Crawford, testified as follows:

I live in Pleasant Hill township, two miles below Pleasant Hill, at the edge of the bluff, and am 45 years old. I have resided in that vicinity most of my life. Have known the Mississippi bottom since 1858.

I don't know, though, as you could ever successfully farm them; I mean there was about the same amount of land farmed before the levee as since; they farmed about as successfully before as since. Before the levee Bay Creek had a pretty fair channel. We never thought about its hurting us then; now, it is pretty bad, and has been getting worse; it is occasioned by the back water. When the creek gets up there is no current in it. It used to be that it had a current and kept the drift out. The creek

joined the river current and carried it off. Prior to the forming of the drift we had a good channel to carry off water, but since the forming of the drift, hardly any. The water spreads out over the land. I don't think the lands in the two townships are worth as much to-day as before the levee was built. I own land in the district. I am a defendant in this suit. My father owned land 209 *a* formerly. I own 160 acres.

We never noticed the back water then, and I never heard them talk about it. The bottom was then overflowed by a general rise in the river, and there was a current in the whole bottom and a steady sweep to the south. The creek used to back up some when the water was up, but it never got out of the banks in those days.

I didn't have any land in 1871; my father did. I got 40 acres of land in 1873 or 4 from Mr. Turnbull. I first observed Bay Creek becoming obstructed in 1875 and 6 and by drifts and things in the creek. The back water wouldn't remain a great while on my land.

Cross-examination, by Gov. J. M. Palmer.

The owners once took some steps to keep Bay Creek open but it didn't amount to much. The Bay Creek back water was on us longest in 1882 and 3. All of that year except six weeks Bay Creek ran through freely. Yes, it stopped and pooled. There were some few drifts forming. I don't hardly think Bay Creek would have cleared itself out as it was before in the 11 months of the year if this drift had been cut out and removed; if the drifts had been cut loose and the water were running through freely it would. I hardly think it would have carried the water 11 months in the year if the drifts had been moved. There is always a freshet in the spring. The freshet might have the effect of carrying out the drift if it was loosened. I have seen drifts along the creek ever since I can recollect, but then they were small drifts and 210 *a* whenever there would come freshets they would go out until this big one was formed; it would have cost considerable money, $300 anyhow, to have removed that drift. I think it could have been done when I first remember it. We tried to keep the creek clear and have worked on the drift some and tried to keep it clear, but didn't make a success of it, but it could have been done.

Testimony of Alexander Hemphill.

If the drift had been loosened there are occasions when the water might have swept it out entirely, but whenever it would strike this back water it would stop again. The back water went out so still it just caused it to stop and stay there and after a while the back water would go out and Bay Creek would run as before; if the drifts had been out the creek wouldn't be so bad. I knew that the levee was being built by bonds and that the benefits were assessed upon the lands and were the means through which the asessments were to be paid.

Re-direct.

The drift I have spoken of formed in Bay Creek in 1875 and 6; it filled the creek from bank to bank and nearly filled it in depth; it was a solid mass composed of dirt, logs, stumps and fragments of wood, but if the logs had been cut away the dirt would have gone like all that drift.

Testimony of James Ruyle.

James Ruyle, examined by A. J. Crawford, testified as follows:

I live in Pleasant Hill township and have lived there since 1870. I knew the country before the building of the levee and also the township in Calhoun county adjoining. Some of the lands were farmed before the levee was built and some have been broken out since the building of the levee, as they supposed 211 *a* it would be a protection to the land. Land has been abandoned that used to be farmed before the building of the levee. Before the building of the levee Bay Creek had a deep channel and was from 60 to 120 feet wide and carried off all the water up to 1875 so that the lands were not affected by overflow that I know of. I saw the drift of 1876 a few days after it was formed. The river water was a little above where the drift formed, probably a quarter of a mile. When the drift came down the creek and struck the back water there was a short bend in the creek and it began to fill from bank to bank with trees, logs and everything on the banks of the creek and it settled right there in this bend. Had it not been for the back water the river current coming through would have washed it out, as it did the smaller ones. The drift between the timbers and wood was filled with dirt and mud. There were twenty men trying to get the drift out. They

cut, sawed and worked on it and tried to get rid of it, but every rise in the creek caught that much more. They tried to burn it. The whole country gathered there and tried to get rid of the drift, but could not do it. When it first formed it was 300 yards long; it didn't get any lower after the water subsided. There is very little passage way for the water under it. There is probably a mile there where there is no channel. On our side of the creek the lands are pretty nearly worthless for farming purposes. Below the drifts in Calhoun county on the bluff side they are not bothered with water as much as they used to be because the water goes out on the west side of the creek. Of course they are
212 *a* troubled with back water. Those lands are not worth as much to-day as they were before the levee was built. They are not as good for farming. Right in my locality they are not farmed like they were when I went on the bottom.

On cross-examination, by Gov. J. M. Palmer, witness testified:

I went on the bottom in 1870; was acquainted with the lands, up to the county line, since 1847. When the drift formed it lodged against the bank and the timber. There was a short bend in the creek. It was 300 yards long when I first saw it. We didn't have any boat to take logs out of the water when we could get to it. The back water remained above the drift six or eight weeks. Those we cut out floated away and lodged in other places. Every time the creek came up we would go and try to cut the drift away. We used nothing but axes.

The creek is free about eleven months in the year; the back water and head water generally come about the same time. When we got a big freshet, most of it left its course, and the old channel would fill up and run full. It is four miles from where the creek returns to its original channel, to the Bay, and about four miles above the drift where the old channel has been abandoned; it is filled up above the drift a mile or two.

I never signed any petition; I knew the levee was being constructed, but didn't know my land was to be assessed to pay for it. I heard it from different sources; I heard the levee was being built on borrowed money, or bonds. We formed a district
213 *a* company there to fight it, and have been fighting it ever since. I never paid a cent of levee taxes in my life. It ruined the country. I heard that the bonds had been sold to build the levee; I didn't know anything about it.

timony of
n McLean.

John McLean, examined by A. C. Matthews, testified as follows:

I live in Pleasant Hill township, have resided there near the bottom about all my life. I am 60 years of age. I am familiar with the lands in the bottom, they were farmed successfully before the levee was built, though of course they lost their crops some years; more crops have been lost since the building of the levee. The loss is caused by the creek and back water. The lands are not worth as much as they were before the levee; it has not been any benefit to those lands whatever.

On cross-examination, by Gov. J. M. Palmer, witness testified:

I bought my land just after the decision in the Webster suit on the legality of the bonds. When I bought the lands I didn't know there was a levee assessment on them. I don't think the people there ever derived a particle of benefit from the levee. It could not benefit them in the shape Bay Creek is in. I thought when I bought my land the bond business had all been defeated and settled.

timony of
ittle.

Samuel Little, examined by A. C. Matthews, testified as follows:

I live in Pittsfield. I moved into this county the day the first plowing was done on the levee. I held the plow the first furrow that was plowed. I was in the employ of Skelsey, Fuller & Pierce. I commenced in September and worked until
214 *a* the next February, with a team of my own, and for the next 18 months I was foreman. I stayed with them until they got below Gilgal and during that time I was on the work all the time. The right of way was cleared up by parties ahead of us who had the contract for the clearing and grubbing it. My understanding was that the levee was to be built above the high water mark of 1851. Mr. Corthell set the grade stake. I think I have seen logs covered up near Stapleton's, but none of the bosses were in sight. I saw the land plowed for a muck ditch at the end of the section. The ditch was made there, when Corthell or Murphy were near, but after they went away we would fill up

and go ahead with the levee. All that was done was these two or three furrows. Backwood's bend, the last place I worked, there was no muck ditch at all. At Mud Slough in the bend there was no ditch cut at all. The ground was frozen and we had to plow at night to keep the borrowpits open, but we didn't plow the center at all. Where there was timber nothing was done except clearing the ground off. The winter I was there was a very cold one and if we didn't plow at night we couldn't work the next day at all. Most of the work was done with scrapers in the forenoon. After the second plowing was done we could throw it on with our hands. The material was all frozen. There is heavy timber at Blackwood's bend and it is one of the most dangerous places on the line of the levee. The material is sandy here after you get off the top. The ground on which the levee was built was not grubbed. All the grubbing we did was 215 *a* where we took dirt. Blackwood's bend is a heavily timbered country.

Lots of places I went down five or six feet; some times we had to quit on account of water. When we got to a certain depth the seep from the river came in a boom and drove us out. Every hundred feet there was ten feet left between the borrowpits, I think. Taking the dirt from the inside continued down all through the Blackwood's Bend country.

The muck ditch was never put in any place, that I can recollect; we dumped the dirt right up to the stumps, and left it there; I have seen logs covered up there. They didn't pull out the old logs, on account of the dirt, but they covered them up.

On cross-examination, by Gov. J. M. Palmer, witness testified:

I never saw but one break in the levee, and that was the first one; I don't know the cause of it. Mr. Corthell would go along the work every day, or every other day. He had assistants—Mr. Murphy and Mr. Parkhurst; they would pass up and down the work most every day; they would show me the cross-sections and the height of the sides, and the stakes. Corthell and his assistants saw what was going on; he never inquired about it, but when no one was around we would not dig the center but covered the center at once.

timony of
uel Little.

The berm is the part that isn't plowed on the outside of the levee. I think we left twelve feet from the borrowpit to the foot of the levee. They were all some distance from the slope stakes. I never saw Mr. Corthell very often; he never gave me instructions to do the work different from what it was being done. If 216 *a* the slope was too full he would make us plough them off again. Mr. Corthell placed the stakes for the height; I have driven some of them down; sometimes, when there was a hollow near the stakes, I have driven them down three inches; I never did it but twice, and then it was where I had hard work to get there.

imony of
. Massie.

M. D. Massie, examined by A. C. Mathews, testified as follows:

I reside at New Canton, near the levee district—since 1854—and was one of the signers of the original petition. I attended the meeting at New Canton, held by Mr. Clark, and heard him read the portions of the law providing for the construction of the levee by assessments against the land. I went into it with the understanding that the law gave us the right to build the levee and maintain it under a system of assessments. Most of the people were enthusiastic about the reclamation. We relied upon the provisions of the law, upon those two subjects, for that purpose. There were some objections, but I don't remember the parties who objected. The jury held several meetings at New Canton.

I heard of a suit gotten up at the lower end of the levee for the purpose of testing the law. I think the suit was decided in the court at the time the second assessment was in the hands of our collector. The second one was so high that people declined paying the assessment, and about that time we heard that the law had been declared unconstitutional and the bonds void.

I have always taken a friendly interest in this enterprise and went into it in good faith, hoping it would be a success. I 217 *a* do a milling business and general merchandise business, which brings me in close contact with people throughout the bottom. I think we have had five breaks, and at each break the water has come over the bottom almost entirely.

After the break of 1876 and the decision declaring the law for the collection of assessments unconstitutional, we had no means of keeping the levee up except by voluntary contributions and by a deed of trust. At that time the people had put a large amount of money in improvements, fences, buildings, houses, and the like, in the bottom, relying upon the levee. I put some of my land into the deed of trust. The hope was to raise money to put the levee in repair and protect the property we already had there. This continued until the constitution was amended and a new organization made.

As a rule whenever the water approached the danger line there would be calls for aid and the people would come to the levee by the hundred and work and patrol it. They took their teams, wagons, scrapers and shovels and sacks to be filled with dirt. Everything was done that could be done. I think that in order to keep up the levee it is necessary that work should be done upon it every year in the way of repairs, especially when the water is pretty high, and there ought to be some means for levying assessments for that purpose. I went into it with the understanding that the law gave that right. The Sny levee broke the first time April 17th, 1876. My estimate is that there was 218*a* 10,000 acres in wheat that year, allowing 18 bushels per acre which is a reasonable estimate, at 70 cents per bushel it would make $126,000 worth of wheat. I estimate 8,000 acres in corn at 30 bushels to the acre, worth 20 cents a bushel, making $48,000. It broke again in June 30th, 1880, and my estimate for that year is 15,000 acres of wheat worth $189,000, 10,000 acres of corn worth $60,000. It broke again April 25th, 1881. There were two breaks that year and nothing was raised on the bottom. We put the estimate at $500,000 for breaks that year. The last break was May 14, 1888. At a low estimate I put it at 40,000 acres of wheat and 30,000 acres of corn. $504,000 on wheat and $180,000 loss on corn. The loss on fencing, buildings, drifts and cost of clearing up after the break, the entire time $157,000. I make an estimate of the total loss for the five breaks $2,357,000. I think this is a very reasonable estimate because the wheat was worth more than I have estimated it at. In addition to the losses of property there was a loss occasioned by residents nearly all moving out and also for the expense of refencing and clearing drift. A great deal of injury has been done to the land by drifts at the time of breaks. All the breaks have been in what we called the old levee.

Testimony of D. Massie.

On cross-examination, by Gov. J. M. Palmer, witness testified:

I think I owned between 340 and 350 acres of land when Mr. Clark presented the petition to me. They are set forth correctly in the book here. I acted with others in encouraging the building of the levee. The reason of signing the petition 219 *a* was to initiate proceedings under the law. Our idea was to reclaim the lands so it would benefit us. I understood we were to pay for the building of the levee and the maintenance of it by assessments on the land under the Act of 1871. I supposed the levee would be built by the land owners and that the lands would be assessed in proportion to the benefits and that the benefits would be determined by a jury. I knew the jury was at New Canton and that it made assessments on the land. I was requested by Mr. Brewster to act as deputy treasurer of the preliminary organization and did so, and collected certain assessments and received the money. I knew bonds were issued and delivered to the contractors. I don't know that there was a higher price put upon the lands in consequence of the levee, but I know I was quite anxious to sell some pieces and could not do it. If any advanced it was some of the more desirable pieces where it was easily brought into cultivation. A great many men felt that it would be successful and made improvements and put lands in cultivation with that feeling. Before the levee was built the lands there were frequently overflowed, but the damages were slight because there were no improvements on the wild land. After the break of 1876 improvements did not cease entirely. A good many people lost everything they had and were discouraged and lost faith in the levee. I only know of the improper construction of the levee in one or two places. In one place in particular it was caused by making borrowpits on the inside instead of the outside, and they went to such a depth on the land side that a heavy 220 *a* body of water came through the sand.

There was a break of that kind in Blackwood's Bend. The inside borrowpits were too deep. I don't remember of anything being done in the way of repairing the levee before it broke in 1876. The levee requires constant attention. Between the break in 1876 and the one in 1880 there was voluntary work done and work was done under a deed of trust to fill the breaks and most of the money was used in that way and not much was spent in strengthening the levee at other places. The levee is exposed

to the danger of the working of small animals and the growth of roots and the heavy pressure of water, but the greatest danger is when the water is high in the river. Testimony M D. Ma

Re-direct.

I regard the first levee as too low and too narrow at the base and too weak generally and it was located on dangerous places at times; in regard to the increase of prices during the progress of the levee I only remember that there were a good many transfers of land but never knew much about the values; in our locality they advanced in price just about what the improvements were worth. After the break it took two or three years, or longer to get another crop. I understood the law gave us the right to construct the levee and maintain it and relied upon the provisions of the statute as read by Mr. Clark.

E. J. Chamberlain, examined by Harry Higbee, testified as follows: Testimony of E J. Chamberlain

I have testified before in this case at Pittsfield and Spring-
221 *a* field. I took a course of engineering in Chicago at an engineering school and had a year's experience in Kansas as deputy surveyor and was then elected county surveyor of Franklin county and was a surveyor in Ottawa until 1884. I wrote up a set of abstract books for this county and soon after was called to take the place of Mr. Clare, who was engineer of the Sny Island Levee Drainage District, and have held that place ever since. I am a member of the State Society of Civil Engineers and Surveyors. Have had considerable experience in levee work. I have been the engineer in charge of the Sny levee since October, 1884, and have devoted myself largely to it ever since that time, some years almost entirely. The location of the levee, beginning at the head, is upon a sand ridge at a place believed to be above the high water of 1851, thence running southerly or southeasterly; it is divided into stations of 100 feet each. At station 30 it comes within 300 feet of the head of the Sny, and the levee passes the Sny and runs for about a thousand feet to station 50 where there is a new fill around what is known as the Horse Shoe Crevasse of 1876, which was the second in order of time. Below this crevasse the levee is located 150 or 200 feet from the bank of a slough for about 2,500 feet. At station 106 it comes to the north bank of

mony of Cham-berlain.

the Sny where the levee was built across what is usually called the head of the Sny. At station 130 it comes to within 200 feet of the eastern bank of a slough and follows near the slough, 150 or 200 feet from it, something over two miles. At station 212, plus 222 *a* 25, it comes to what is known as Fish Slough crevasse.

At station 228, plus 25, is the first of the series of five crevasses of 1888 in what is known as the Stillwell field, opposite Hannibal, above the approach of the bridge about half a mile. Station 285 is the north end of the new fill around the Stillwell crevasse of 1881. At station 301 plus 20 the levee intersects the Wabash railroad. The condition of this portion of the levee, as I found it in the fall of 1884, was that it was considerably eroded from wave action. In some places I found from one to three or four feet of perpendicular bank where the bank had been cut away, instead of a uniform slope from the top out.

From about station 301 the levee follows the Wabash about a mile and a quarter to 370. Through the railroad there were two crevasses, one in 1876 and one in 1880. Leaving the railroad, the levee is located near a slough from 100 to 300 feet distant, as I remember it, and at 419 it comes to what is known as the Rouse crevasse of 1888. At station 454 it comes within 200 feet of the bank of the river, and continues for 600 or 800 feet, to the original Rouse homestead. At 543 it is within 150 to 300 feet of the river for three-quarters of a mile or more. That was the condition at that locality in 1885, but I examined it last fall and the river bank is now eroded to the foot of the slope of the levee, and in 1888, when I was getting material for strengthening, we had to go to a sand-bar in the river to get material to put on the slope of the levee.

223 *a* Station 846 is right at the north end of the new fill around Big Cut-off crevasse of 1880. A considerable portion of the levee from the Wabash Railroad to this point is near the bank of the slough, but generally there has been room to obtain material for improving the slopes from the river side of the levee.

At station 914 it comes to the north bank of the Big Cut-off The Big Cut-off was a branch of the Sny that cut off from the Sny and carried a large portion of water from the Sny to the river, or from the river to the Sny—depending on the stage of the water—and was fully as large as any portion of the Sny itself. At station 955 the levee was in 1885, within 120 feet of the river bank.

and I believe the bank of the river at that point would drop vertically to the water's edge in ordinary water.

From the center of the levee to the river bank is from 90 feet to about 300 feet for 2 miles below and a considerable portion of that distance we had to dig dirt from the land side in repairing it since I have been conected with it. From a mile below Cincinnati to Murphy's Bay the levee is located on the eastern bank of a slough so near to it that no material could be obtained from the river side of the levee. The former pits were taken almost altogether from the land side of the levee nearly all the distance. At 1276 the levee reaches what is known as the '76 break, which I am informed is the first crevasse that ever occurred in the levee, and at the south end of that it reaches the new fill around the crevasse known as the circle break of the Blackwood's bend 224 *a* break of 1881. At 1323, the north side of Murphy's Bay crevasse which was refilled on the old line, and at 1327 the north end of the new fill around the crevasse of Crooked Slough in 1888, making 4 crevasses in a very little more than a mile. At Scott's Landing the center of the levee was 280 feet from the river bank in 1885, and from station 1538 to 1650, a distance of about 2 miles, the river in 1885 was from 103 feet to 300 feet distant. That was the location of some rip-rap work done by the United States government. During all that distance the material has been almost exclusively removed from the land side, on account of the proximity to the river bank. From that place to the intersection of the C., B. & Q. railroad the levee is located near the bank of a slough, and a portion of the way material was gotten from the land side of the levee between the levee and the slough. The levee then follows the railroad embankment to where it leaves the C. & A. railroad at station 1823. Something over two miles of railroad embankment is made use of for the levee. From station 1890 to station 1920 the levee is within 100 feet of the river bank, and at that particular place the levee bank itself was composed of tenacious material known as black gumbo, and the levee itself was washed fully half the width from the crown back needing but two or three feet more washed away to let the water through at that point when I took possession of it. This erosion was caused by a wind storm in April, '84. Some portion of that wave passed over at Scott's Landing and at Cincinnati. At Cincinnati the same can be said; nearly half the ground bank was washed away. From the last point to station 2066 the levee is located near the 225 *a* slough bank, but far enough so that material was taken for the original construction and for repairs from the river

Testimony of Chamberlain.

side of the levee. At station 2060 the river was only from 49 to 100 feet from the center of the levee for about 2000 feet. This point is where we put in some bank revetment, and the Government has put in about 3,000 feet of rip-rap since. At station 2125 the levee reaches the north bank of Iowa Cut-off. Station 2142 is opposite Clarksville, Missouri, and at the crossing of the Clarksville and Pleasant Hill road. Station 2249 is at the north of the new fill around the Clarksville crevasse and station 2258 is on the north bank of what was originally the mouth of the Sny a little below Clarksville, and portions of the levee below this we have done but little work on. The location of the crevasses of 1888 are at King's Lake, 2550, and Bay Island, 2559, and the latter is the north end of the fill around the Bay Island crevasse. I will not mention the location of the numerous crevasses of 1888. The greater portion of the levee had large brush and timber, some of it 6 inches to a foot in diameter. The northern portion of it, however, was comparatively clear down to Cincinnati, the greater portion of the balance of it was grown up to brush. At these places I have mentioned the levee embankment was cut away, where it was subject to wave action. The end of the levee is at station 2754 on the north bank of Hamburg Bay. In some places towards the end of the levee it is in close proximity to the river and the greater portion of the way the material was removed from the river side, but in a few cases it was not, leaving large pits on the land side. The principal place is at what is known as the 226*a* Grewell school house at station 2060 to 2080 where the greater portion of the material for the original construction was taken from the land side. The general condition, as regards repair, of the levee at that time from one end to the other was bad, for effectually withstanding the waters of the river. There were two breaks, one at King's Lake and one at Bay Island. They occurred in 1880 and 1881 and when I took charge in 1884 they were stilled unfilled. I filled them in 1886. I ran a line of levels for the purpose of making bench marks and I found many places where the levee was two or three feet below the original grade. I consider the brush a damage to the levee because the roots penetrating the embankment and dying and decaying, would leave an opening for a waterway or channel through the levee. They also prevented the observing of weakness in time of high water. (Witness here produces and refers to certain profiles and plats show-

ing the progress of the work on the levee from the time he took charge of it up to the present time, and containing other information concerning the original levee.) I made the profile of the cross sections myself and know they are correct. Testimony E. J. Chan ber

(By agreement of parties witness was withdrawn from the stand for the present.)

P. J. Myers, examined by Harry Higbee, testified as follows: Testimony P. J. M

I live two miles and a half north of Rockport where I have lived for 15 years. I worked on the levee at the time it was being constructed about two miles and a half below Hannibal in the winter time. I drove a team. I don't recollect to have seen
227 *a* any puddle ditch or muck ditch constructed under the levee where I worked. It was in a timber country and small stumps and trees were grubbed out under the levee. We didn't take out the large ones but would cover them up. I recollect helping fill up around two or three stumps.

J. S. Myers, examined by Harry Higbee, testified as follows: Testimony o J. S. Mye

I live at Rockport. Am not a land owner. I worked on the levee at the time it was being constructed about two miles below Gilgal. Worked there a couple of weeks in the winter. If there was any muck ditch or puddle ditch put under the levee there I didn't see it. It was in the timber and I didn't see any grubbing done. We covered up the big stumps. I noticed one big log covered up, it was two or three feet through and 10 or 12 feet long and lay length-wise of the levee. I hurt my horse on it. We filled up on each side and the boss told us to go over, and my horse got between a stump and the end of the log and hurt himself badly. That is the reason I remember it so particularly. There was a break in the levee I think afterwards close to where the log was covered up. I can't recollect exactly where the break was.

On cross-examination, by Gov. J. M. Palmer, witness testified:

I don't pretend to say positive that the break was at that place, but it was close.

Testimony of W. J. Reeder.

W. J. Reeder, examined by Harry Higbee, testified as follows:

I live on the Sny island three miles southwest of Rockport. I cultivated my place before the levee was built, from March, 1869. I raised crops there enough to sell to the men building the 228 *a* levee. I only worked a part of a day as it froze and they sent me out to cutting. I saw them puddle ditching a little at the head of Turkey-foot sloagh for probably a quarter of a mile. I never noticed a puddle ditch any other place. I saw when they were at work at Scott's landing, never saw any puddle ditch. I didn't see where they had hauled out any stumps in the timber, they must have covered them up. I raised good wheat, but not much, only about 7 acres, and good corn before the levee was built. Raised better corn before the levee was built than I have since as a general thing.

On cross-examination, by Gov. J. M. Palmer, witness testified:

The breaks in the levee made me lose crops. Before the levee the sediment in the water was an advantage to me.

Testimony of M. P. Iler.

M. P. Iler, examined by Harry Higbee, testified as follows:

I am not a land owner but live in the bottom. Have lived there about 58 years. I had 35 acres in cultivation before the levee was built and raised as good corn as I ever raised anywhere. After the levee was built, I tried farming two years and lost all I had and quit. My loss was caused by seep water. The river was high and the water just seeped through and came to the top of the ground and I could do nothing. The seep water made the ground so wet I couldn't touch it from the time I planted to the time to gather it. The quarter I farmed on was not as valuable after the levee was built as before. There has never been a good crop raised on it since. I noticed they were building the levee from Blackwood's Bend down to Scott's landing. I was on the levee a good deal then. Didn't notice them making any puddle 229 *a* ditch or muck ditch under the levee. Never saw them plow but once thoroughly. There was some scattered timber there, above Blackwood's it was very heavy. I don't know what they did with the stumps, never saw them cover up any but saw them cover up a large sycamore there. It was 70 or 80 feet long.

It ran angling across the levee. A man by the name of Coon had the contract and he told his men he would pay them extra if they would have that log covered up before the walking boss came along and they pitched in and covered up. The ends of the log came near the ends of the levee on both sides, the top towards the northwest and the bottom towards the southeast. It was near where the break occurred. I was up on the levee afterwards and helped repair it and we grubbed a stump out that we supposed this tree was cut off of. You might say it was right in the ditch of the levee.

Testimony of M. P.

On cross-examination, by Gov. J. M. Palmer, witness testified:

No portion of the log was left sticking out. It was a long tree and they tried to pull it around but could not get teams enough to pull it, so they covered it up. The stump was outside the levee close to the foot of it. The tree was right near the stump. The levee didn't break where the log lay at that time. Afterwards the lower circle break, or crooked slough break, occurred there something near right where the log was. I know the break was right in the neighborhood where the log was.

Joseph C. Harrison, examined by A. C. Matthews, testified as follows:

Testimony of Joseph C. Harris

I reside in Bellview, in Calhoun county, Illinois. I own 230 *a* land about three miles from the lower end of the levee and a mile and a half from the mouth of Bay Creek. I am in the back water country and the levee doesn't do me any good I think. I had my land inclosed in 1875 and 6 and the break of 1876 washed the fence out. I commenced to cultivate again in 1888 and the levee broke again; in 1891 there was no high water and I raised a crop; in my neighborhood we have not been any more successful in farming since the levee was constructed than before. We don't raise any crops if we get high water, and when there is no high water we don't need the levee. The trouble with us is the high water which backs up as high as the C. & A. Railroad. I don't know as to the value of lands compared to that before the levee was built. There is more demand for land now because the population is increasing and there are more renters. Nearly all the land is broken out. There is more demand for land on account of the stock law, as we don't have to put up any fences now. I don't

imony of ph C. Harrison.

attribute the demand to the levee. I paid the first original assessment in 1875. There was a suit pending and I quit paying. I believed that the decision in that suit released us from further demands. Under the new organization we paid after the decision in the Blake case because we thought they would sell our land if we didn't pay it. I don't think the levee benefited us. I don't know whether the levee was built or not when I bought my half section in 24. When I bought my other land I knew it was assessed for levee purposes.

On cross-examination, by J. M. Palmer, witness testified:

I just had a tax deed. The levee doesn't protect my land. The assessment was not very much down there. I paid fifty cents an acre for the tax title and the land is probably worth five
231 *a* dollars an acre now. The tax title is better now than when I bought it. I have put up two houses and broke all the sod; it is worth two dollars and a half to break the sod. The houses are worth $100 to $150. With improvements and all my land is worth $5 an acre. I don't mean to say two dollars and a half an acre is the current price for breaking sod, but I have known that to be paid.

imony of J. Chamberlain.

E. J. Chamberlain, examined by Harry Higbee, again testifies as follows:

(The papers here referred to are introduced in evidence, marked "Defendants' Exhibits 3, 4 and 5.")

In my opinion there were defects in the location and construction of the levee; the location being so near the banks of the streams or the river banks in places that the necessary material to construct the original levee had to be taken from borrow pits on the land side. The earth was taken out from two to six feet deep, and in localities where there was much quicksand exposed; in opening land-side borrow pits much trouble and expense have been caused. When the surface soil was removed nothing remained to hold the quicksand in position and the hydrostatic pressure forces the water through and destroys the quicksand, carrying portions in solution and removing other portions, until a spring-like stream is formed, when the work of destruction is rapid,

The crevasse of 1876 was, I believe, caused from that alone. Since my connection with the levee I have, in course of strengthening, filled up borrow pits on the land side, and have successfully protected the levee in that way in those places. The greater
232 *a* portion of the material which has been thus added was added this last winter, but we have had no test of it yet. By reason of the location of the levee this additional or extra work was necessary afterwards to protect it and to make it strong enough to hold an ordinary high water.

In order to prevent quicksand from escaping underneath the levee and in the borrow pits, as it did formerly in times of high water, we placed a heavy embankment, in 1888, upon the land side, making the slope so flat that when the material is wet it won't run or slough off. We got black dirt or coarse sand, if possible, for this purpose, covering the quicksand that had been uncovered by the excavation of the borrow pits on the land side.

If the original levee had been removed some distance from the sloughs, so that none of the material for the original construction or repairs need be taken from the land side, but all could be taken from the river side, very little, if any, of the work and material we have used on the land side would have been required. The material could all have been placed on the river side of the levee, giving additional height and cross-section. This error in location will apply to many cases, the entire length of the levee, and the case I give is only an illustration.

There are many places it would have been better if the levee
233 *a* had been farther away from the river, so as to have left a fore-shore of timber and brush to prevent waves upon the levee, which is very dangerous in case of high winds. This fore-shore of timber and brush would largely prevent erosion, and the natural repair would be reduced to a minimum. Where the levee is located near the river there is very much wave action. The action of the water has cut away the dirt where the levee was exposed, with no timber or brush between it and the river, and these are the only places that we so found.

The errors of construction may be placed under four heads. They are: insufficient grade, insufficient preparation of the bed or base of the levee, insufficient cross-section, and improper location of borrow pits.

Testimony of C. J. Chamberlain.

From Mr. Corthell's notes I learned the data for the grade line of the levee for a five-foot crown. The high water of 1851 was taken as a basis and determined from the high water mark at Hannibal and at Louisiana, and the difference in the elevation marks made less than six inches to the mile. No allowance was made for the change in the environments; that is, confining the river, which was formerly from five to six miles in width, to something less than 1,500 feet, as is the case at the Hannibal bridge. The same condition applies to the Louisiana bridge, though I have not the exact length of the bridge.

The effect at these places, as I find from notes actually taken in the field in 1888, and also in 1892, at the time when the river was at or near its highest stage, to elevate the plane of water
234 *a* at these points, and there has also been more or less of change in the grade of water. From a plane of six inches to the mile at a point above Hannibal, for illustration, for four or five miles the plane or surface of the water is level, and at another place at the head of the levee it is nearly level. Then there is a point below the Wabash where there is a fill, I think, of two feet or more. In a number of places from Cincinnati to Louisiana there are reaches of the river, extending from half a mile to a mile, where the plane of the water is level, as I observed in 1892. Then there will be a rapid fill. For a short distance above the Louisiana bridge it is level for some distance. But the fill, taken from one end to the other, is about six inches to the mile. These local conditions or changes I find to exist from its present environments.

Such a grade-line as the original line of the levee was not even theoretically correct, unless the levee was composed of stone or hard substance that would keep it up to grade, and also would keep burrowing animals from making under-ground channels six to twenty-four inches underneath the ground, running transversely across the embankment, as was frequently done, from standing water on the one side to standing water on the other. The channel of the mole, about two inches under the surface of the ground, caused much injury to the levee in 1888 in localities of insufficient grade, where the water came to the original grade or within a few inches of it. In 1888 there were some three or four miles
235 *a* of the levee where there were several hundred such instances. In some cases as much as a wagonload of sand would seem to have been carried out.

The levee was not high enough. It was supposed to be to the high water of 1851, but I repeat that was not theoretically correct. At that height it would be insufficient; if from nothing else, from the fact that the wind would throw waves over it and cut the material away, unless it was of stone. It would also settle and become much lower. At the time I ran the levels I found it two or three feet below.

I have one place in mind just above the head of Gilgal prairie where for something like two miles the levee was from two to three feet below the grade. At another place a half a mile was fully two feet below and there were a number of other places where it was below the grade. The plane of the water being raised, both at the Hannibal bridge and at the Louisiana bridge, the levee would have been insufficient to have withstood the water of 1851, if it had been up to the grade line of 1851. I know from working on it prior to 1888 that the elevated portions above Hannibal were about at the Corthell grade and I have been raising the grade from six inches to a foot above the Corthell grade in those localities. I know that in that year the water was from six inches to two feet above the heighth of the levee where it was known to be at the Corthell grade, from my own levels. I think the grade should not be less than three feet above the highest known water to 236*a* make it a reasonably safe levee. As a matter of fact the high water of 1888 came to the 1851 mark that had been identified by me. I was there and saw it within a couple of inches of the mark myself at Hannibal but from evidence obtained from correspondence with the signal service of the United States I am led to believe that we didn't have a water equal to the water of 1851 at that time by two feet or more. The Corthell grade generally is two and a half feet below the high water of 1851 and above Hannibal it would be from two to five feet below the actual grade of 1851. The same rule would apply, though probably to a less extent, to the water at the Louisiana bridge and also in the bend at Scott's landing. The plans I am working on to establish a grade line from the plane of high water as I found it, was devised in 1888 and confirmed by notes taken in 1892. The next defect was in the preparation of the bed of the levee. I saw a number of stumps standing in the Rouse crevasse of 1888 at a height that stumps are usually cut off above the ground, from five feet above ground, and lower at the Godman crevasse.

In filling around the old crevaase the King's lake and also at Bay Island I permitted some of the original levee to be removed

Testimony of H. J. Chamberlain.

and found there stumps that I considered very objectionable, for unless the road bed is clear of all perishable matter it will form a seam between the two, and the new embankment will not become mortised to the ground so that a seam of water will be found running through between the levee and the original surface of the ground. I have observed this in small embankments and in 1887
when there had been no rains on the levee the road on the
237 *a* berm at the foot of the levee had considerable water on it,
all running on it from under the levee embankment. I attribute that to the improper junction of the new levee with the surface of the earth. The water came from the river but it was not high enough to percolate through the levee embankment, though high enough to submerge the lands. The ground was wet inside the levee nearly all along the road way. I can account for it in no other way than I have stated. I know that we have never had any of it in cases of the new levees where the muck ditch has been made and the ground properly prepared. The levee that I have put in and that the Government has put in has all had a muck ditch and all roots and connections from the river side to the land side cut off. I consider that necessary and all authorities on levee construction are very rigid on that particular specification. The best way to form the bond between the new levee and the original ground upon which it is built is by making a ditch 4 to 6 feet in width filling at the same time as the new embankment and tamping it with impervious material if possible. That protects the joint and mortises the new embankment to the old. With regard to the damage caused by stumps in the levee I can only state that after the water of 1888 when I went to make repairs in the vicinity of Iowa cut-off my attention was called to a large cavity two or three feet in diameter, the examination of which showed that water had been passing through it on to the levee embankment. It was
2 or 3 feet below the top of the levee upon the land side of the
238 *a* slope. I directed it to be filled and when I next passed I
looked at the hole and saw the remains of the stump, the inside having decayed two or three inches of the rim was left. It was three feet in diameter. The evidence was that water passed through and cut away the embankment below where it came through the cavity. During the high water of 1892 I found several places at Blackwood's bend from which the water had escaped on account of rotten stumps. When I saw a stream of water coming out of the berm on the land side I would probe it and almost invariably found rotten wood. My rule now is to have all such stumps dug out before any additional dirt is put in. Insufficient cross section means insufficient thickness and size of em-

bankment. Since my acquaintance with the levee in 1884 nearly all the trouble we have had has been from that cause together with the cause just before mentioned. All through the region of quicksand the levee embankment has been giving way upon the land side, sliding down the slope and the surface of the borrow pits have also dropped down. My plan of work is to get a flat slope and give very much increased cross section. The levee at all these places I found from observation during high waters to be insufficient. In regions of gumbo or black clay there has been no trouble from that cause. In regions of quicksand the levee will stand but a very flat slope. I think no breaks were caused by running over the top until 1888. The slope was two to one on the land side and three to one on the other. There were places where the size of the embankment was decreased by making borrow pits
239*a* 10 feet deep within 10 feet of the levee on both the river and the land side. This would have the effect, so far as strength of the levee is concerned, of a levee 20 feet high with an insufficient base. That is to say, if the levee was on ground that was required for a ten foot levee and borrow pits were removed on each side to the depth of six feet, you would virtually have a sixteen-foot levee instead of a ten-foot levee. A sixteen-foot levee should have a base of eighty feet, but would not have.

I found the levee in an imperfect condition and took steps to improve it—make it stronger and better able to answer the purposes for which built. After 1888 I adopted a new system of construction. When I commenced to work under the direction of Mr. Clark, we brought the slope up to the original Corthell grade in regions where there had been little trouble by percolation or sloughing of the land; but in regions of quicksand we increased the slope four to one instead of three to one. In 1888 we decided to take the elevation of the plane of high water, as before mentioned, in order to learn what kind of levee was necessary.

I took the measurement of the surface of the water at or near its highest, and made notes from time to time as to the fall or rise. I determined to make the slopes at three to one, four to one and five to one on the river side, depending on the location. In the timber where there was a good fore-shore of timber and brush, and the levee composed of impervious material, I thought three to one on the river side and two to one on the land side was suf-
240*a* ficient. If it was not an exposed place, where the levee was exposed to wave action, and there was no fore-shore of tim-

Testimony of C. Chamberlain.

ber, I thought not less than five to one was sufficient slope for the energy of the waves to exhaust themselves upon.

I find by observation that the river banks, and also the levee itself, makes its own slope, if left to nature, of four to one to eight to one, owing the material, where exposed to wave action. So far as I was able I adopted nature's slopes as long as we were able to pay for it. In all exposed places we used five to one, generally. In one or two places of black gumbo, below Louisiana, I have abandoned the five to one slope. In regions of quicksand I have used a four to one slope on the land side, not carrying the grade quite up to the top of the levee on account of expense, but carrying it up as high as we are likely to have percolation from the river. It was generally within two feet of the 1851 water mark; and in many cases lately I find I have to raise that.

I have to raise it about to the 1851 mark, and also make a wider berm on the land side, so that this berm might extend from the slopes of the levee over the exposed portions of the sub-stratum of quicksand and prevent its running into the borrow pits with the water.

In order to keep the quicksand in place, I put a heavy coating of two to six feet in depth and from ten to twenty feet in width of other material over it. This plan has been adopted in all regions of quicksand where the borrow pits are on the land side. I 241 *a* have the dirt hauled from the river side of the levee whenever I can do so and not have the borrow pits opposite each other. In places I get material from some distance away on the land side, even going across sloughs for it. I have attempted to make a flat slope and a four feet base to one foot vertical, instead of two feet base and one vertical, as originally given, throughout the whole length of the levee, and to bring it up to the high water of July, 1892.

We had the greater portion of the levee, from its head to Cincinnati, brought nearly to the grade. From that on down we raised it about two feet. The plane of high water is, generally speaking, about four feet above the Corthell grade, but the grade line to which we worked below Cincinnati is only two feet. The greater portion of the way is completed to the plan adopted at that time. I consider it necessary to raise the levee up to the plan mentioned so as to hold the water.

In regard to the different defects I have mentioned in the levee, I wish to state in justice to Mr. Corthell, that he was powerless to locate or construct such a levee as he would have desired, on account of other circumstances over which he had no control. I don't consider them attributable to any one. An engineer cannot always make what he considers an ideal work. I have made a list of the crevasses in the Sny levee as they have occurred, showing the common name of the break, and the date of the same, to the gauge above the low-water mark of Keokuk and the Hannibal gauge, and the date of filling, getting information from others to the time that I became familiar.

In 1876 occurred the Piling break, so called from an attempt
245 *a* to fill the crevasse with piling while the water was running through. This break occurred on April 17, 1876, and was filled in February, 1877. The second break was the Horse Shoe break, which occurred in April, 1876, and was filled in March, 1877. The third is the Upper Railroad break, which also occurred April 17th, 1876, and was filled in April, 1877. The information I have concerning the breaks prior to that of 1888, I have obtained from other persons. The stage of water at the time of the breaks of 1876, was 19 feet 4 inches Hannibal gauge. The Cut-off break occurred June 28, 1880, when the Hannibal gauge was 16 feet 11 inches, and it was filled in December, 1880. The Murphy Bay break occurred June 30, 1880, when the water at Keokuk gauge was 18 feet 2 inches, Hannibal gauge 17 feet 10 inches. It was filled in January, 1881. There were also two breaks through the railroad near Hannibal on July 3, 1880, about 600 or 800 feet from the break of 1876. One we called the upper railroad break and the other the lower. The lower break was filled in April, 1881. The Fish Slough break occurred April 25, 1881, when the water stood 17 feet 9 inches by the Keokuk gauge and 19 feet 1 inch Hannibal gauge, and was filled in July, 1881. The Circle or Blackwood's Bend break occurred October 18, 1881, when the Keokuk gauge was 18 feet 3 inches, and same was filled in January, 1882. The 9th was the James break which occurred October 19, 1881, when the water was 18 feet 3 inches by Keokuk gauge and 19 feet 11 inches by Hannibal gauge and was filled in April, 1882. The
246 *a* Stillwell break occurred October 27, 1881, when water at Keokuk gauge was 19 feet 3 inches and at Hannibal 20 feet 7 inches, and was filled in June, 1882. The Clarksville break occurred October 25, 1881, and was filled in 1883. The King's Lake break occurred in November, 1881, and was filled in 1886. The Bay Island break occurred in November, 1881, and was filled in

Testimony of E. J. Chamberlain.

November, 1886. The Crooked Slough break occurred May 14, 1888, with the Hannibal gauge at 19 feet 2 inches and was filled in December, 1888. It consisted of five different breaks within a mile and a half above the Wabash railroad. The 15th break was the Rouse crevasse which occurred May 17, 1888, when the Hannibal gauge was 21 feet 7 inches. The 16th was the Sand Pond crevasse which occurred on the ——— day of ———, 1888, when the Hannibal gauge was 21 feet 7 inches, and was filled in December, 1888. There was one crevasse called the Godman break above Louisiana and 33 below Clarksville. They were all filled in 1888. The Godman break and the 33 below Clarksville were filled by the United States government. In 1892 it was necessary to expend upwards of $14,000 in patrolling the levee and necessary work to prevent the water coming through. It was also necessary to raise the levee in places. We used cross woven burlap on places in the levee that showed signs of weakness where the water was running and mud or sand began to slide down and held them in place with sand bags. This was done at many places on the land side from Cincinnati to Louisiana. Below Louisiana the levee was
247 *a* composed of good material, black gumbo, so there was very little trouble from percolation. From two to four miles there we had to raise the levee by side boards a foot wide on edge staking them and then throwing dirt from the sides of the levee to the top at the foot of the boards to keep the water from running over, and in a few places the levee was so low that we had to put a second board on top of the first to prevent it from running over. I find from my notes taken in 1885 that the place last named the levee was nearly two feet below the high water mark of 1851. It was probably in the neighborhood of 2 or 2½ feet below the Corthell grade in some few of the lowest places. It was generally, I believe, in 1892 from 1 to 2 feet below. In 1888 the same situation of affairs existed in regard to the levee above Hannibal and also below the Wabash railroad. I had a large force of men at work on the levee contiguous to the railroad, and the railroad had 200 or 300 men at work there for 2 days probably, strengthening that portion of the levee. The water ran over the levee in 1888 above Hannibal in several places.

I was walking down the levee towards Hannibal near the Sand Pond crevasse when a river steamer went by and the swell from it struck the levee until I got across Sand Pond, a distance of about three quarters of a mile, and the waves were coming over the levee in many portions of it and washing away the sand-bags. Not the bags themselves, but a ridge of loose dirt that had been thrown

up where the levee was made higher by dirt, sand-bags and
248 *a* boards. When I walked across Sand Pond on the old levee
I waded in water up to the top of my boots, to my knees all the way across the pond and the ridge or extra levee put on the top of the old levee was entirely swept away for several hundred feet. I think it probable that the water was running over the top of the levee for half a mile. I know I walked through the water a greater portion of the way across Sand Pond, that is the way the levee went out. At that time I know the levee to have been at, or above the Corthell grade with five feet of crown and a little ridge which was built up above the Corthell grade. I had put on an additional slope there myself so as to get a greater embankment or cross-section. Some places between that and the railroad I had raised the grade from six inches to a foot and a half. The breaks are almost invariably repaired by going around them. There have been two of considerable magnitude filled by going across and some smaller ones, where nothing of the levee embankment was swept away, were so filled, but the rest were repaired by going around them. I have a table showing all the crevasses since the construction of the levee, the length in feet of the old levee damaged and the length of new levee built in lieu thereof, which were obtained from my re-survey, so that the measurements are my own. At the Horse Shoe crevasse the new line is 1090 feet long, the old one 775 feet long. At Fish Slough the new line is 200 feet, the old line the same. That was built across on the old alignment. At
the five crevasses at Sand Pond the new line is 4965 feet and
249 *a* the old line 4732 feet. At Stillwell crevasse the new line is
1780 feet, the old line 1530. At the railroad crevasses, two in number, the new line is 600 feet long and the old the same. At the James crevasse the new line is 1250 feet and the old one 800 feet. At the Cut-off the new line is 2000 feet and the old 1700 feet. In the 1876 or piling crevasse the new line is 300 feet and the old the same. At the Circle break the new line is 1400 feet and the old one 1000 feet. At Murphy's Bay the new line is 400 feet and the old one the same. At Crooked Slough the new line is 2128 feet and the old one 1288 feet. At Godman's break the new line is 520 feet and the old one the same. At the Clarksville break the new line is 1088 feet and the old 779 feet. In 29 breaks south of Clarksville the new line is 5210, the old the same. At King's Lake the new line is 623, the old 529 feet. In 4 breaks below Clarksville, making the 33 above mentioned, the lines both 160 feet. At the Bay Island break the new line 1210 feet, the old 860. Making a total of 25344 feet of new line and 21724 feet of old line, or 4.80 miles of new and 4.11 miles of old. That is, the old line

Testimony of J. Chamberlain.

which was abandoned is 4.11 miles. The total length of the original was 52.04 miles. I have given the breaks in this statement in the way in which they occurred in the levee from north to south. There is a total of 3.32 miles of levee on the new location, the balance of the new levee being on the old line. In every instance where we built the levee around on the new location it was necessary to get a new right of way. The government also pur-
250 *a* chased a new right of way outside the old right of way. The new right of way purchased by the present district would be 3.33 miles. No break has ever occurred in the new levee which has been constructed since I have been connected with it. So far as I know no break has ever occurred in the new levee built since 1876 and there has been very little trouble with any of the new fills.

The levee district uses the line of three railroads over a portion of its way. The amount of the railroad embankment of the Wabash railroad and I am not positive whether the railroad or the levee built it, which is used for the levee is 6740 feet, of the C., B. & Q. railroad about 2000 feet and of the C. & A. railroad 7116 feet, or about 1-27 miles of Wabash and 1-72 miles of the C., B. & Q., and the C. & A. railroads together. That is part of the 52 miles of levee. Two of the breaks occurred in that portion of the levee built by the Wabash railroad together 600 feet. I have made an estimate of the cost of filling and strengthening, for the records do not separate them, the crevasses in the levee. For those prior to 1880 I have gotten my estimates from records kept by other persons. I don't know the amount for voluntary help expended before the deed of trust was given. The evidence I got from the time books was $4365, and the amount expended under the trust deed was $1,380, voluntary help $460, making a total of $6,205. There was also paid through A. H. Levering, cashier of the F. & M. Bank of Hannibal, Missouri, as shown by his books, the sum of $4,170.95, which was in addition to the other amount mentioned. As near as I could get it down the amount received from Spencer prior to the deed of trust was $4,849.72, and received
251 *a* from Spencer under the deed of trust $5,573.87, making total of the amount spent by voluntary contribution under the deed of trust $20,799.54, all prior to 1880. The total amount expended under the new organization from December 6th, 1880, to December 6th, 1893, was $425,638.34. That doesn't include anything expended under the deed of trust or before. After this the amount expended for right of way which has been $103,591.79 and the amount expended between 1876 and '80, $20,789.34, makes a total expenditure of $450,029.25. This doesn't include the amount expended by the government. I have taken my statistics

since 1880 from records kept in the County Clerk's office. (It was agreed between the parties that the statement made by Mr. Chamberlain be accepted in lieu of the production of the documents and that it is the same as the original testimony to which he refers.) The United States government expended in filling breaks of 1888, $19,589.15 and for strengthening the levee at the head of the Sny and and at the Bib Cut-off and at Iowa Cut-off $10,545.78, making a total of $30,134.92, which the Government placed in the embankment of the levee. In addition to that the United States has done much revetment or riprapping since 1890 upon the river banks contiguous to the levee for a distance of 3 miles below Scott's landing and also at other places, the amount of which, as nearly as I can give it, is $20,000, making a grand total, as near as I can estimate it, of about $50,000, including earthwork and expenses and riprapping, in round numbers. To return to the defects in the levee I wish to state here that a short
252 *a* distance above the Hannibal bridge approach there was a borrow pit on the land side of the levee and a fence which was placed by Mr. Stillwell between the borrow pit and the levee was suspended in the air several times owing to the quicksand having been carried into the pit from underneath the fence, and and we had to fill up the pit with natural material. There was also a seep ditch at another place above on the Stillwell place which it took 500 sand bags to fill before it was stopped. In my opinion the old levee, at the time I became connected with it in 1884 was not high enough and strong enough to withstand the water of '51. It is not strong enough to withstand the water of 1888, which was not as high as the '51 water by two and a half feet. My annual reports to the Commissioners of the amount of work done on the Sny levee show that there has been put on the levee since 1880, in filling breaks and strengthening the same, 1,807,329 cubic yards, put on by the new district. In addition to that the United States Government put on 176,543 cubic yards in filling crevasses and 70,606 cubic yards in strengthening the levee at certain slough crossings, making a total, since 1880, of 2,054,478 cubic yards. There remain about 1,000,000 cubic yards to be placed in the levee to bring it to the present plans. This amount we consider we have in sight by virtue of the special assessment which has already been made to complete the work according to the plans adopted as above described, which would make a total altogether of 3,054,478 cubic yards of the embankment put into the levee between 1876 and 1880. I have no exact infor-
253 *a* mation, but from the best information that I have I think the amount would be 100,000 cubic yards, which would make the

Testimony of J. Chamberlain.

total since 1876, 3,154,000 yards. In addition to all that there has been considerable material I have had put in the embankment in the shape of a muck ditch of which I have no record. I can't tell the exact amount that was put into the original levee, but from the original correspondence and estimates I judge it to be 1,950,000 cubic yards. There was afterwards a report recommending that the levee be constructed a mile further. I have seen the average height of the levee stated as 8 and 1-10 feet. I have in mind, however, 8 and 2-10 feet and made my estimate on that basis. A levee 52.04 miles in length, of an average height of 8 and 2-10 feet, such as was constructed, would contain 2,133,192 cubic yards. The amount of material required to construct a new levee of the present adopted grade line, if located on level ground, of the same average height as the ground of the original location and raised to the same grade line we have now adopted, would be 3,783,987 cubic yards, if the borrow pits were kept at the proper distance from the side of the levee. The amount of earth that would have been necessary to have added to the original levee with the original slopes as it had at the time of its construction, to bring it up to the present grade line with the present slopes, would have been 1,651,795 cubic yards. The amount of material which has been used in filling the breaks and strengthening the old levee is more than 254 *a* that contained in the original levee as constructed by Mr. Corthell. (Witness withdrawn.)

Testimony of R. M. Murray.

R. M. Murray, examined by Harry Higbee, testified as follows:

I was one of the commissioners of the first district appointed under the Drainage Act in 1880. There was no connection between our organization and the former organization connected with the Sny levee, we were entirely independent. The old organization didn't do anything in connection with the levee after we went in. They made no formal delivery to us of the levee or anything connected with it. They took no charge of it. I haven't been there for years but I understand that. All the breaks since 1875 have occurred in the old levee. The railroad embankment opposite Hannibal was built I believe before the levee and the levee joined on to it. The same is true of the C., B. & Q. and the C. & A. embankments.

On cross-examination, by Gov. Palmer, witness testified: Testimony R. M. Mu

I didn't know at the time the first commissioners were appointed under the new organization that any one was in possession of the levee. I had heard that there was a decree of court rendered in 1878 putting things into the hands of commissioners as receivers. The new organization simply took possession of the levee and controlled it from that time forward, but had no connection with the organization under the deed of trust, and has been controlled by the present organization ever since. There was no objection to it and nobody was consulted.

E. J. Chamberlain, examined by Harry Higbee, again testified: Testimony E. J. Chamberl

There have been used in filling breaks and strengthening the levee 1,022,000 cubic yards of earth more than was used in constructing the original levee. I intend in this estimate to
255 *a* include all material placed on the levee since 1876 and that we have in sight by virtue of the last special assessment. We have put on in round numbers, just the amount of cubic yards in the original levee exclusive of the 1,000,000 we have in sight. The general average of the new grade over the old grade is some 4 feet. Some places it is 5 or 6 feet, other places less than 4, but the general average is 4 feet. A new levee of the height and grade adopted under our system, and located upon a better location where we would not have to fill borrow pits, would take in round numbers 3,787,000 cubic yards; that would construct a levee of the height to which we are now working, with the Corthell slopes.

I know of but very few places in the length of the levee in which the levee might not be located from two hundred to five hundred feet east of its present location; I call to mind but two places where there is any slough or where it would throw the new location on bad material or lower ground. I have calculated that it would take fully 630,000 cubic yards more to construct the levee which I have last mentioned, upon new ground, than the number of yards which had been already used in filling the breaks and strengthening the old levee since 1876.

In a general way the commissioners, and all interested, prepare to protect the levee in times of danger, by organizing a patrol

Testimony of H. J. Chamberlain.

and getting material on the ground to protect it in case of need—such as sand-bags, burlap, brush and straw; but we find bur-
256 *a* lap is more convenient to get to the place, and much safer for us. As the danger increases we increase the patrol, and keep it going day and night, from one end of the levee to the other, whenever there are any signs of weakness. The levee is divided into districts for that purpose; we make it into mile sections, and sub-divide as occasion requires. The landowners turn out generally and give assistance. They were all we had until 1892, when we also got a considerable force from Hannibal and Louisiana. At that time we had to get a large body of men in a short time and we got them from those places, and they worked by day's work. Many men who could not go personally sent help or supplies; persons in the mercantile business in the small towns along the edge of the district would send supplies or help or would look up men to work and send them in by the wagon load, as required. The work was prosecuted day and night when needed.

A levee like the one in question requires constant watching in times of high water, to protect it; because the material at hand is not of the character which would be used in building a reservoir, for instance, for constantly retaining a body of water; and where there are defects in construction it would require more constant watching in time of danger than when built entirely of better soil and with a muck ditch.

The action of the elements is a great source of danger; it is also affected by burrowing animals, and wave action is one of the great sources of danger. It is absolutely necessary to pro-
257 *a* vide for the maintenance of the levee in order to make it protective, for even a reservoir would need such attention. It would not be safe to put up embankments for levee purposes and pay no attention to them. The work I have spoken of as having been done by the government was done at the solicitation of those interested in the levee lands.

Since I have been connected with the levee there has never been any connection between the present organization and any former organization. Every dollar that I have had for use in repairing the levee has come through the present organization in the manner I have detailed.

As I have said before, the stumps in the levee are a great source of weakness. I have had nearly all on the land side,

through regions of quicksand, taken out. I marked the stumps, where I found them, with stakes, and had the contractors report the stumps by numbers on the stakes. I wish to add that one place developed very rapidly toward the close of the water of 1892, which proved to be caused by a sycamore tree, probably four feet in diameter, which was hollowed out to a rim of two to four inches thick; the roots were running toward the levee in all directions, and the roots were decayed and left a channel for the water, a considerable portion under the levee.

About four miles of the old levee has been broken, or washed out, including therein what is abandoned by the fill around the breaks. When a break comes the pressure upon the levee is removed, though it depends somewhat upon the location of the break; if a break occurs at the lower end, there is a consid-
258 *a* erable pressure at the upper end. When the water reaches the same plane on the inside of the levee as it is on the outside, all pressure is removed.

On cross-examination, by Gov. Palmer, witness testified:

I gave the levee no personal observation prior to the time I took charge of it. I was not intimately acquainted with the land upon which it is located, prior to 1880. From my own judgment, and what I have observed since, I can state what would have been the proper location for the levee in 1872. I am giving you the result of years of study and close observation; more knowledge than I had in 1880. I got the gauge at Hannibal of the 1851 water from a stone shown in a building there, marked "High water of '51," and shown to me by parties who were there at the time.

I have reasons for believing the river is higher at Hannibal now than in 1872. The confining the water to a space of 1,500 feet, in lieu of five or six miles, raises the plane. I agree to the theory that water will find depth when the banks are contracted—if there is nothing to prevent, no riprapping or solid stone; sometimes blue clay is very hard to erode.

Theoretically, the river is supposed to descend at a certain grade, but that is affected by other circumstances; for instance, a sudden rise in Salt River causes the plane of high water in the Mississippi River immediately below its mouth, to be raised above the uniform plane; the water becomes piled up, as we say in common parlance. Then concave, bends, forming a kind of dam back

Testimony of J. Chamberlain.

up the water thereby changing the level. I know of some
259 *a* places where, in the last eight years, the banks of the river between Hannibal and points below in the direction of the levee, have been worn away by erosion for about one hundred feet. This endangers the levee, by bringing the river nearer to it, so it would probably undermine if steps were not taken to stop erosion. On each of these occasions it cut part of the right-of-way under the levee.

There have been some dikes placed by the government in the river, by way of deepening the channel and improving navigation; I believe they have very little or no influence on the high water; some say that they would have deposits are made above them, and frequently below.

I have access to the original notes of Mr. Corthell in regard to the locating of the levee, and have traced the location throughout its whole length. I have not traced it from notes—nothing more than measurements taken—not by running transit lines from the notes. I do not know the actual height of the levee, was not there when it was finished.

After the first year I think the levee would not settle at all. I have no means of knowing how much it did settle. I do know the top was not at the original grade as shown by the notes; it ran from two to three feet, in many places for considerable reaches of the levee the top lacked two feet of being up to the original grade.

I believe I know what would have been a much better location
for nearly the entire length of the levee than the place where
260 *a* it was located, that is on account of places from which to obtain material. I believe a much better location for the safety of the levee would have been east of where it is; there are a few cases where I think it would not have been necessary to make a change. My opinion is it could have been erected at very nearly the same cost; there would have been very little difference. The difference between the elevation of the ground upon the bank of the slough and the elevation 200 feet east would be possibly from two to six inches, but that is a guess on my part. The location 200 feet east would avoid the removal of dirt and the making of borrow pits on the land side; enough dirt could have been found on the outside.

There would have been an advantage also in increased base of the levee by removing it from the banks of sloughs where now located, giving greater distance for percolation from these sloughs under the levee. The soil would have been very much the same. There would also be the advantage of being a foreshore to prevent wave action and erosion from the same and the energy of the waves would be largely expended before striking the levee, upon the foreshore of timber. From an economic point of view the lands between the levee and the river would have been wasted. A good levee might be constructed on the site chosen if you don't consider the expense of getting material and where it is to come from. You would have to bridge sloughs to get material to fill the embankment. I would have avoided the sloughs by going farther east.

Testimony E. J. Ch

There was not enough in the cross-section in any event in the present location and to fill sloughs would have required several hundred thousand yards in addition. For a distance of 4 or 261 *a* 5 miles below Scott's landing it would have taken 40,000 cubic yards to have filled the sloughs along the levee so as to make the levee as good as if located 200 feet east. Even then I would not consider it as good. I find from reference to the cross-section of the levee that the distance the water would have to percolate to the bank of the slough and to the borrow pit, as I find it, is 74 feet; if this slope had been extended into the slough, as it would be if 40,000 cubic yards were added, then the additional distance of percolation would be 14 feet nearly; but if the levee had been located easterly far enough to have obtained all material from the river side, then the distance of percolation or resistance would have been the entire distance of the bottom or levee district to the bluff on the land-side or the distance from the levee to the Sny or some slough, plus a distance of about 30 feet, which would be the minimum distance that the borrow pits should be removed from the river-side to the bank of said barrow pit.

From the evidence I have, I believe the right-of-way is 100 feet on each side of the levee. Within that limit I think there would have been ample room to get all the material necessary from the river-side. I can only infer that the reason which influenced the engineer to adopt what he did was the additional height of embankment saved, five or six inches, and the additional land reclaimed. There is very little filling of the interior barrow pits except in the immediate vicinity of crevasses.

Testimony of J. Chamberlain.

I am able to make a close approximation by measurement of
262 *a* a portion of the dirt taken from either side of the levee, the slopes having been flattened some, and in a number of cases I have examined the depth of the pits on the land-side with a view to study of the levee to know what to do with the pits, and I find that there is only four or six inches of silt or new material upon the clean sand, which I have every reason to believe was the bottom of the original borrow pits. I could calculate approximately the amount of dirt taken from that pit. The area of the pit would be about the same, and the dirt which would have gone from the bank would have been added to the bottom; in a very few instances the eastern banks of the pits have been plowed up and in a few cases I have directed the pit plowed and cleaned out so as to mingle the soil with the surface soil to stop percolation or seepage of the water. Small willows have grown up in some cases in the pits and in many cases we grubbed them out. I know pits have not been filled on the river side because we paid too much money for partially filling the greater portion of them.

I calculated the amount of dirt that was placed in the breaks prior to the time I went on the levee from field notes of my predecessor Mr. Clare. I don't think that even under the specifications a good levee could have been built on that line. The kind of dirt to be used in the ditch in the center of the levee is not specified, and the kind used might not be impervious. Article No. 5 of the specifications says the berm must always be from 10 to 15 feet on the river side and 30 feet on the inside. I
263 *a* think the greater portion of the Sny levee could not be made sufficient under those specifications owing to the material out of which it must be built and the substratum underlying a portion of the levee. I don't know of any place where the levee broke where the specifications were observed, for the reason that I don't know whether the specifications were observed. From the evidence I have of my own in regard to the defects in the levee I think the amount of money that has been spent since 1876 would have made it reasonably secure by constant watching and attention. A levee requires watchfulness, repairs and restorations, but the amount would depend upon the original construction of the levee and the amount of danger that would become apparent from time to time. The more perfect the levee the less watching required. No site could be selected in the alluvial bottoms that is absolutely free from danger. The earth which has been placed there by me is somewhat greater than the original amount used. During my first year I worked, several

thousand dollars were expended almost exclusively to bring the levee to its original grade and original slope; the greater portion of the same eroded that year. Wave action is one of the destroying elements. A considerable portion of the earth I have mentioned has been used in filling breaks. I suppose 257,211 cubic yards have been actually used in the restoration of the original grade. Very much earth has been used in giving increased height to the levee and increasing the slope. I increased the slope
264 *a* in regions where danger has been apparent, from 3 to 1 to 4 to 1. I don't know what remained of the Corthell slope and what part properly belongs to restoration. I believe that the greater portion of the breaks below Clarksville have occurred from water on the inside, but don't know positively. I tried to prevent water standing against the slope of the levee on the inside except in regions of back water which is unavoidable. I think the levee has suffered to some extent from waters on the inside, below the Clarksville break, but I know of no case where there has been much injury, if any, from water on the land side after a break. By the time the inside water would have stood long enough against the levee to thoroughly saturate and weaken the embankment the water became the same height on the river side so no resistance would be required at the embankment. I know of no continuous current along the levee on the inside. There would be the usual flow of the current in the stream. I found stumps themselves in the levee. I never counted them; as I remember, in the Godman crevasse in a distance of 200 or 300 feet there were some six or eight. I don't think that any break was caused by stumps, but believe them to be a great source of danger. In several instances I know of water coming through cavities in the rotten stumps. From a short distance below Cincinnati and Scott's landing the greater number of the places where there was a large discharge of water has been where these cavities were caused by decaying stumps. Whenever I saw such instances I put my hand in to feel if there were a stump and would mark them and
265 *a* have them afterwards dug out. Those I have observed have with one exception, been in the berm on the land side, not under the levee direct. You can not find those under the levee now. I have added to the levee on the land side so it covers them up that much deeper.

The levee does not necessarily break because there is a stump in it but it is an element of weakness and a continued source of danger. The twenty years has not destroyed these stumps except where they are near the surface. Where the stumps are kept

Testimony of J. Chamberlain.

constantly wet it would not be such a great source of danger except for the seam that there may be between the earth and the stump. If for instance, you place a plank under the levee it is necessary to make an obstruction or clog to prevent the water from running along the board. It would soon start a stream carrying out the soluble portions, giving more room and less resistance to the water. I think I know of no case where any danger threatens the levee from the penetration of roots that have grown. Means have been taken to prevent the growth of willows and I have the timber removed from one end of the levee to the other. The only instance I know of where the levee has broken in consequence of roots growing in the levee since it was built was in the case of the break of 1888. There has been a number of reaches of the levee cleared prior to my connection with it, but the greater portion had grown to brush when I came in. At the lower end of the levee trees had grown up in the slope, but there was very little on the upper end. They were principally cotton weed and sycamore trees. Mr. Corthell was an engineer of reputation and was probably some 30 years of age when the levee was constructed. I am only familiar with the levees on the lower Mississippi by reading and by correspondence with parties connected with them. I believe it is true that levees on the lower Mississippi river sometimes break. I am unable to say whether they are the best constructed levees or not. I should think the difficulties of constructing levees here would be less than there. The length of the high water is very much longer there so that is a longer time for the embankment to become saturated which causes weakness and also causes erosion of the river bank. There is a very much greater increase in the caving of the bank than there is here. Our experience here is that there is very little or no abrasion of the levee by the current. I think the velocity makes very little difference in the plane of the water. It was my understanding that the land owners took possession of the levee about the time of the danger in the river in 1876. They commenced watching then, although I don't remember of hearing that anything was being done. They only formed an organization. I found work that was done by people prior to this levee. I found a small ridge of dirt which was identified to me as a portion of the original Leonard levee, and the Sny levee was in the same way identified to me as being the same. So far as I know the land owners have been in possession of the levee since 1876. I know nothing positively above the trust deed.

266 *a*

267 *a* Re-direct.

Concerning the levees of the lower Mississippi, I know from records that I have that the oscillation between the water and high water there is from 30 to 40 feet, while here, during my acquaintance with the levee, it is from 20 to 22 feet; that would subject the lower Mississippi levees to greater danger because of the additional height of the embankment that would be required, and the increased height would subject them to greater erosion and a greater amount of annual expense for repairs. The rule of engineers is a certain per cent. of increased width of cross section has to be given for different height in addition to the slopes we have been discussing. I believe that Mr. Corthell stated to me that the construction of the Sny levee was the first work of any importance of which he was chief engineer. I think I had that information from himself but would not say positively. Since that time the science of levee building has progressed a great deal.

I think the cost of moving the dirt per yard, on the original levee, is 19 cents, as I have seen it some place, but I had thought it was 22 cents. With the facilities we now have for moving dirt it can be done much cheaper and more rapidly. I believe that wages are lower now than they were then, and that the same dirt can be moved now a great deal cheaper than it could then.

There were portions of the location of the old levee that I would consider unsafe for the location of a levee with the ordinary means of construction we have now. The removal of the
268 *a* levee 200 feet east, at the point where it broke opposite Hannibal, would have thrown it east of Sand Slough and have avoided that break and the Stillwell break, I think. I think it would have avoided the greater portion of the five breaks of 1888. Or, the location of the levee 200 feet more to the east would have given from 500 to 2,000, approximately 2,000 feet, increased width of river, as far as the levee itself was concerned.

The same might be said of the location where it joins the railroad opposite Louisiana, where it would have given from 1,400 to 4,000 feet in the river, if the location had been easterly of the bank of the slough. The distance would be a mile and a half for the levee to run directly across, and the distance around the railroad embankment is some two miles.

timony of J. Chamberlain.

The levee certainly would not have been high enough or strong enough, if built according to the original specifications, to resist the water of an equal height of that of 1851. I say that I can still determine the original size and location of the original borrowpits in all cases where we have not removed dirt from the side adjacent to the borrowpits. By observing the borrowpits on each side of the levee I can determine approximately the amount of dirt that was put into the levee from these pits. I made careful measurements, and taking what material we have put on the levee since I became acquainted with it, we got a close approximation of the original size of the pit.

timony of remiah Adams.

269 *a* Jeremiah Adams, examined by Harry Higbee, testified as follows:

I live at Atlas, close to the levee district, and have lived there for forty years; I don't own any land there now. I was one of the signers of the original petition, and I think I signed the second petition. I owned lands there then.

I attended the meeting held by Mr. Clark, at Rockport; he gave a full explanation of the law, and I understood from his explanation that it gave me and my associate land owners the right to construct a levee by assessments against lands benefited; I also understood that we would have the right to keep the levee in repair by like assessments. I understood the levee was to be paid for by bonds. Relying on the right to build and maintain a levee, as explained to me, I signed the petition. Had I not so understood it I would not have gone into it; had I not thought I had the right to maintain it also.

Mr. C. B. Dustin owned a body of land west of Atlas subject to overflow, and we built a levee after the break of 1881; there is something over 1,000 acres in the levee. I remember the breaks of 1876, 1880 and 1881. We leveed our lands because we had become discouraged with the original levee and thought there was no possibility of protection from it. Only some of the old levee protected us up to 1876. The lands we leveed lie right on the margin of the district; a portion of the lands I owned are outside of the district, and reach down into the district.

Testimony
Jeremiah
A

On cross-examination, by Gov. Palmer, witness testified:

I relied upon the law, as read to me by Mr. Clark, and signed the petition for that reason; and the second petition also.
270 *a* I supposed the levee would be located under the authority of the County Court of Pike county; that commissioners would be appointed who would superintend the location and construction of the levee. I was not there during the session of the court when they were appointed. I understood that the lands would be assessed according to the benefits and that the assessment would be proportioned by a jury. I knew the bonds were on the market. I relied on the commissioners and their agents to give me a good levee. I sold my lands to my children; I presume they knew that this assessments were on the lands when they bought them.

Statement
Colonel A.
Mat

Colonel A. C. Mathews stated that:

I signed the second petition, that is the petition looking to the second assessment against the lands. Before any order was entered granting the prayer of the petition, or any steps were taken, or the presentation of it to the court, I withdrew from it and my name was stricken from the record by order of the court and I was no party to the subsequent proceedings. I knew the contents of the petition both when I signed and when I withdrew, and in a general way knew the antecedent proceedings in regard to the levee. I owned no lands at the time the levee was projected nor until it had progressed considerably. I bought no lands subject to the taxes in the deed. I think it likely I sold some that way. I had a provision in the deed something like this: That the covenants in this deed are not to extend to any levee assessments or anything of that character. But I never bought any with that reservation, nor can I speak positively about
271 *a* what deeds I gave where I made such reservations. I will add that I bought lands believing that they would build a levee and I believed they would maintain the levee. The law soon came into discussion, however, after that and my attention being called to it, I was not so clear on the local proposition. I was familiar with the letter of the law and that was one of the reasons that induced me to withdraw. I didn't want to go into it in doubt that way; about that time some of these cases had been decided. Of course I went into the deed of trust and all that sort of thing.

Testimony of V. A. Grimes.

V. A. Grimes, examined by Harry Higbee, testified as follows:

I am the clerk of the county court of Pike county, Illinois. I have been clerk for 7 years and was deputy for 12 years. I knew *Captain Westlake, William Dustin, John Wheelock* and George W. Jones when levee commissioners. The date of the last report filed by them as commissioners is January 16th, 1887. The record doesn't show any report filed since.

On cross-examination, by Gov. Palmer, witness testified:

There is no record of the report itself, there is an order of court merely referring to the fact that they had made a report. It states only that the commissioners had expended all the money in their hands. The order was made at the time an additional assessment was asked for. The entry was made in connection with the prayer for an additional assessment and simply refers to the fact that all money had been expended and that more money was needed; then follows the order of the county court for
272 *a* another assessment. The record doesn't show any report as to the condition of their finances prior to that time.

Testimony of H. P. Dodge.

H. P. Dodge, examined by A. C. Matthews, testified as follows:

I reside in Atlas and have lived there and in that neighborhood 18 or 19 years. I came to this county about the time the work on the levee was commenced with Mr. Skelsey of the firm of Skelsey, Fuller & Pierce who had a contract for the construction of the levee. I commenced working on the levee soon afterwards when the work was just being done between the Wabash railroad and the head of the levee. I stayed with Mr. Skelsey until the levee was completed. I was at work on it all the time and passed back and forth. I had been employed on the Government canal at Keokuk for moving dirt 7 years before we commenced on the levee. I have also worked on the levee every year since the fall of 1876 or '77. I filled in the first break. After the levee was completed I went into the bottom there and farmed a little and railroaded a little. I have been there ever since and own land in the bottom. I bought my first land in 1876 after the break. There has not been a year since that I have not worked on the levee, and I have filled several breaks. I think the specifications provided

that the timber and perishable matter was first to be cleared off the ground, all stumps cut low and grubbed out; and at the beginning of the levee I think the contractors tried to follow the
273 *a* plans and specifications pretty well with the exception of the muck ditch. The ground was to have been plowed and a muck ditch dug 3 feet deep and 18 inches on the bottom. It was to be filled with good black material different from what was taken out, especially where there was sand. I don't remember about the tamping, but when I went up in company with Mr. Skelsey to look over the line to show me how to construct the levee, a good deal of this ditch had been dug out and the sand thrown to the center and they were grubbing right across it. The top surface was composed of leaves, brush and everything else and the edges of the ditch they crossed with scrapers and teams and tramped it back in and they filled it with a great deal worse material than they had taken out. About that time Mr. Corthell came along and he called Mr. Skelsey's attention to it and ordered him to clear it out and put back something better, but the contractors were as a general thing older than the engineer. The engineers would go over the line about 8 or 10 o'clock and probably get back at 3 or 4 o'clock in the afternoon, and after they had passed in the evening the necessary ground work for the next day was prepared covering up all the defects; everything they didn't wish the engineer to see was covered over before he came down the next morning. It was filled in and covered over so that anyone looking and thinking they had done the work in a faithful manner was fooled in the construction of the ditch. I don't think any logs were covered up at that time and that place. Colonel Colyer who had a special contract pulled all the logs and
274 *a* brush off until we got down below the Rouse place, some- thing like two or three miles below Hannibal. Then the contractors began to crowd him with a dirt force and the logs and stuff were not taken out of the way; the ditch was filled with bad material.

No extra pains was taken to haul in black dirt; I never saw it tamped at all. When the cold weather came on we were down at what is known as the Aldrich place near the Big Cut-off in the timber country and the surface of the ground was full of large roots. They then abandoned the digging of the ditch altogether. The ground was frozen two feet deep; in order to keep the borrow-pits open they kept the work pushing right along and opened them out deep even going to the river water. On the inside they often ran to a depth of 6 or 7 feet, and there was a berm to be kept on

Testimony of A. P. Dodge.

the inside 25 feet wide. When they got down to Rouse's, near the Aldrich place, they got in a hurry and ridged across the Big Cut-off to get that done in a rush before spring. They seemed to have a promise to get about such a distance and there was a great strain to make it. I was up and down several times along the work and they were hauling anything that would build a bank of levee. The digging of the ditch and the clearing of rubbish was neglected badly. It was a dangerous portion of the levee there. From Rouse's down I never put in a foot of muck ditch myself and I don't think anyone else did. We were ordered to plow and did attempt to plow but we cut into so many roots it was discontinued; the plow would be jerked out with the roots and we skelped along with some plowing and so continued
275 *a* throughout that winter. When we got below Louisiana to what is known as the Thurman place we began to push on Colonel Colyer, who was doing the clearing, and he couldn't keep out of the way for some reason; were pushing on him too rapidly and a good deal of the brush and other material was left on the ground at that time. When they got to the Big Cut-off the firm of Skelsey, Fuller & Pierce broke up. The work was next started in under Mr. Foxen, of Detroit, who represented the bondsmen. He had charge of it until the work reached Louisiana and it was then taken in charge by Mr. Mansfield who took the contract under the Detroit bondsmen and he stayed to the end of the work. The Big Cut-off was built entirely across in the winter of 1872 and 3. In order to keep the dirt from sliding from the bank at the Big Cut-off they drove in piling clear across and filled it with brush; the bank still continued to slide and they put in more piling and put brush across it and got it up above the water that spring. Skelsey was receiving bonds from the levee commissioners for his work and was selling them where he could to pay his men. The further we went down the more haste there was and the less exacting they were in the construction of the levee. Colonel Colyer was not able to keep the clearing out of the way and abandoned the grubbing. Below the Big Cut-off there was no more stumps grubbed on the outside except possibly a few now and then. Some of the easier ones were cut out and the others were cut low and dirt was thrown over them. When Mr. Corthell came along and found such things he would instruct us to
276 *a* clear them off and charge it to Colonel Colyer. I did clear off some of it and presented my bill for payment at the office and was told that Mr. Colyer had overdrawn his pay and nothing was due him, and I got nothing. After that I came on to Colyer's stuff I did like the rest and covered it up. After the engineers

would pass along we would go to work and cover everything up. The assistants kicked considerably but we done the same with them. The stumps on the inside to the center and in the line of the slope were cut low, but I have seen some of them so high that you could scarcely cover them with the inside slope. It has proven to be a bad job since. I am satisfied that if the muck ditch had been put in according to the plans and specifications the whole levee would be substantially as tight as the Circle put in at Blackwood's Bend. I put in that work and I first cleared off the ground then plowed it well and dug a muck ditch down about three feet deep and three or four feet wide; I then filled it up with good black dirt and tamped it in and put up the levee with a slope on the river side of three to one and the same slope on the inside instead of two to one as formerly. The Government did the same thing when they repaired the levee at Murphy's Bay; that place has never broken since although it is the most treacherous place on the levee. We have never had any trouble where we put in a muck ditch. When we come to the timber country past Blackwood's Bend I saw them put the levee right on top of the roots; that was in the winter.

277 *a* The soil there is composed of drift sand; it formed a natural bridge, and the levee was put on that. It was a severe winter and the ground was frozen two feet or more deep, and of course we took advantage of the contractors to go as deep as we could after we got a borrowpit open. This would not have been as cheap for the contractors if the ground had not been frozen. I regard that manner of construction of the levee through that dangerous country, where the pits were on the inside, as fatal. The borrowpits were principally on the inside.

I put in the break of 1876. I remember a great spring that came up just inside the levee, below that break; that spring ran through as long as the river remained bank-full and it afterward resulted in the breaking of the levee. It was caused by some deject in the bottom, like trash; it came right through the bottom.

At the Godman place, about three miles above Louisiana, there was a break about 300 feet long, and it came from one of these springs beneath the levee; the spring had broken out there, and the watchman had gone away when it broke. It didn't wash out any below the original surface of the ground, but just swept the levee away. It left stumps exposed in the levee where it washed away; I counted twenty-two, standing from two to four

Testimony of L. P. Dodge.

feet high. The ground had not been plowed there. In 1888 there were a good many breaks below that place.

I have been in the employ of the new organization, and have frequently acted as superintendent in times of danger. I think I have been there at every high water. At such times people
278 *a* always turned out and put forth their best efforts towards saving the levee. In 1892 we put up sand-bags and boards; but for this work it would have run over below the C. & A. Railroad. The old levee was raised a foot by false work at that time. I don't call that a protective levee. The last two months the work on the levee, for some cause or other, was rushed through. From Scott's Landing down, the grade stakes were driven and the dirt was put on—the amount the stake called for, without making any allowance for shrinkage; it was slack work. In 1892 the water would have gone over the levee if it had not been raised. It had been raised all along north from Louisiana before that time, and didn't need any boxing; but from Louisiana down it stood at the height Mr. Corthell left it, and there it had to be raised by boxing and sand-bags.

There was a canal at the lower end, running from the main Sny down a mile and a half or two miles. It was about four to six feet deep and thirty feet wide; it was not big enough to carry off all the water that pours into the Sny as it was left. The levee, as originally built, was not high enough to turn the water of 1851; it was not wide enough, and was not constructed with sufficient slope. It was not supposed to be high enough to turn the 1851 water—the engineers on the levee told me that at the time they were building it.

On cross-examination, by Gov. Palmer, witness testified:

I got money to fill the break of 1876 from the land owners generally. There was about $3,800 paid me. I think I got
279 *a* $1,600 or $1,800 from the deed of trust. The break of 1876 was filled before there was a deed of trust. When the break of 1876 occurred I went to George W. Jones and asked him if anything was going to be done to fill the break. He said he had heard some talk about it, but didn't know much about it. I asked him if something couldn't be done to raise money to fill it. He said he didn't know; hadn't anything to do with it. He directed me to Mr. Irwin, who was a land owner. I got some encouragement from Mr. Irwin, and afterwards came back with Mr. Petty,

and we got contributions in Pittsfield for $700, and some dollars in cash, and went right to work. Testimony H. P. Dod

The work we put in has stayed there to this day; it is absolutely necessary to have an annual and constant fund to keep such a levee in repair from year to year. Where these stumps were buried they are now beginning to cave and under the stump a cavity will be formed for the water to collect and press out and will for years to come yet; it will never do to lie down and be quiet in a high water; in putting in the break of 1876 I got nothing for my time, I paid my own board and worked all winter for nothing; lots of other men did the same thing. We paid out $3,800 in keeping up the boarding house and paying the shovelers and a great deal of the time work was donated; if all who worked had been paid a fair cash value for their work I think it would have cost about $5,300. We used a part of the Wabash Railroad, probably a mile, and a mile and a half of the C. & A. Railroad and the C., B. & Q. Railroad as part of the levee. I understood the
280 *a* contractors were being paid by bonds issued by the commissioners at ten per cent. off. I am a defendant in this suit. I own about 1,000 acres of land. There is nothing in my deeds with reference to levee taxes. The value has not increased with the construction of the levee. I bought my land depending on the levee to protect me; I think the man I bought of asked an increased price on account of the levee. I paid more for it than I would if the levee had not been there. I began the work the first of November, 1872. I talked with Mr. Skelsey about the manner of filling up the ditches and the engineer called his attention to it and directed that it should be done properly. I have seen clean earth put in it in places where there is no trash to be scraped in it. This deceptive work was done, I think, over the greater portion of the levee where the ditch was put in. The ditch was dropped out about three miles below there. I think the work was never done according to Mr. Corthell's directions. On my own work I started to dig a ditch until it froze up and put in what was on top of the ground, but when it froze up we abandoned the ditch altogether. They allowed us to abandon it. After we quit making the ditch they dropped off our pay for it. Mr. Corthell's attention was called to the matter and he said that it was impossible to do it; it was freezing and was interwoven with roots and it was impossible to plow it. We left the stumps also. Mr. Corthell saw the stumps. I remember one stump in particular we had great difficulty in covering up. The muck ditch on my mile extended probably a quarter of a mile. Mr. Corthell said he would

Testimony of F. Dodge.

281 *a* have to permit us to abandon the muck ditch until it thawed out. I afterwards built 1,000 feet of the levee in the Blackwood's Bend. Mr. Corthell was up and down every few days and was continually on the levee. My other contract was on the prairie above Gilgal, where I put in another 1,000 feet. We did some plowing there; I plowed three or four furrows and then replaced the earth upon it. I also constructed about 1,000 feet of the levee between that place and Louisiana, which was done in the same manner, but it was in the timber and no ploughing was done. The engineers directed us to remove the logs and not to cover them, but we did, but gave no directions as to removing the stumps. I also did some work below the C. & A. Railroad. We had abandoned plowing before that time because they didn't exact it of us.

I don't know of any defects in the construction of the levee where that break occurred at what is known as the "Government Circle;" the original levee had no muck ditch and the surface was not plowed nor the brush removed. Those who were there in 1876 know that the original work was imperfectly constructed. I didn't tell the land owners at Pittsfield of the defects in the levee; I believe they generally thought it was a safe one, but after it broke they lost confidence. I have something like 700 acres in cultivation. I first fenced with rails and after they washed away I put up post. I also put up cheap farm houses. The rails would be worth about a dollar a hundred. Well, I have realized three or four crops. The first wheat I lost was in 1880; have grown about three good crops but only saved one of them. I have been in the

282 *a* employ of the present levee district upon an average of three months a year since its organization. I have often told them of the faulty work done on the original levee. I signed the trust deed and tried to do whatever I thought best to raise means. My work has all been by the yard for the dirt handled; I have never had any regular salary. When I bought my first land I was told the old bonds were null and void and we would never have to pay the old levee taxes. I knew that the old assessment had been made on the land I bought. Mr. Petty, of whom I bought a part of my land, told me the old levee taxes would never have to be paid; that the bonds were repudiated and were not legal.

Re-direct.

It was no part of my duty to remove those logs and stumps. That duty was imposed on Colonel Coyler who had a contract to do it, with Shelsey, Fuller & Pierce. After being to the expense of about $20 in removing them: I told them they would have to have Coyler do his clearing himself and I would cover up anything he left behind. Mr. Corthell watched us while we attempted to plow and make a ditch and saw it was impossible for us to do it and said "I see it is impossible for you to do it and that will pass until the freeze lets up when it must be resumed." After that we quit making a muck ditch and we never got any pay for it. I believe the breaks were the result of the fact that the bed of the levee was not properly grubbed and a muck ditch put in.

Testimon H. P. I

Re-cross examination:

I think at the commencement of the break at Murphey's Bay 283 *a* the water was running through between the surface of the ground and the levee where there was a layer of soil and decomposing vegetation.

Thomas Worthington made the following statement:

I purchased my land in the summer of 1886. I think before buying any of my land I read the Updike decision. I read the decision of the Updike case and was told that the Webster case followed it, by lawyers here. I bought my land under the belief that that was the law of this State so far as the old bonds were concerned. I knew of the old bonds and old assessments and investigated the matter with reference to that; that is, I studied the decision.

Statemen Thomas Worthi

Cross-examination by Gov. Palmer.

I only knew of the steps taken under the law of '71 in a general way. I knew of the organization, that there were assessments and that bonds had been issued and that they were unpaid. I bought some ten years after that decision. I heard there were some proceedings against Jones, Westlake and Wheelock and made some inquiry concerning it and was told it had been abandoned some years before; that Palms had refused to go on with it. I presume I had heard of the deed of trust, but have no recollection of it. At least a portion of my land I bought from two ladies in Williamsburg, Pennsylvania, who had recovered their land in a law suit against Stillwell and had no connection with the levee, and never lived in the State, and sold out to me in 1886.

Testimony of C. N. Clark. —Recalled.

284 *a* C. N. Clark, being recalled, made the following statement:

While the general value of land went up with the beginning of the building of the levee, the decision of the court in 1876 and the breaking of the levee which occurred at the same time caused a general break in the values of lands. The fact that the break had come and that it had been decided we had no law by which we could construct or maintain a levee caused prices to go back as low or lower than before the building of the levee. I bought 440 acres for which I paid $4.50 an acre while the levee was being built. Fifteen years afterwards I sold the same at $6.00 after paying levee taxes for 15 years.

On cross-examination witness testified:

Before the building of the levee and while the organization was being talked of I agreed to pay $6.50 an acre for 700 acres of land, and I sold the land eight years after to Munger Brothers for $3.75 an acre. I think in a general way lands advanced probably $1,000,000 in value before they went back to less than they were before the building of the levee.

Testimony of Wm H. Lewis.

William H. Lewis, examined by A. C. Matthews, testified as follows:

I live at New Canton and have resided there since 1852. I worked on the levee under Bailey, Hancock and Ryan, sub-contractors. The first contract I was connected with was below Cincinnati about 3 miles in the upper part of the Blackwood's Bend country. Some of the work was pretty well done and some poorly done. They didn't dig a muck ditch some of the time and didn't clear the road bed part of the time; they didn't plow it and 285 *a* covered up a good many stumps and logs. I also observed the work done by other contractors sometimes in passing up the levee; I saw them digging a muck ditch all right some times and other times you would see them cover up that muck ditch. Sometimes they would grub the road bed and sometimes not. When it got frozen the ground was not plowed. We generally went down in the borrowpits as far as we could during the cold weather when it froze; we didn't want to open a pit any oftener than we could help. We got material outside of the berm.

Mr. Corthell went along every day and I suppose he saw what was being done. I think these borrowpits have caused a great part of the trouble to the levee; that and the covering up of stumps and failing to put in a muck ditch. I think that the muck ditch would have stopped the leakage better than anything else, if done according to contract. Where it had been put in the levee has not leaked much. I think the borrowpits are dug too close to the levee, and too deep on this side of the levee; the dirt was gotten from the wrong side of the levee. I don't think the levee was near high enough to turn the waters of 1851 or the 1861 water. I didn't get all of my pay for my work on the original levee. The contractors had some trouble and there were 150 men and 65 teams at work with Bailey all winter, and they didn't get any pay.

Testimony William H. Le

Cross-examination:

I have some land in the levee district, which I bought nine years ago, in section 8, 5-6. I understood in a general way
286 *a* that the levee was to be built by the issuing of bonds to the contractors. When I bought my lands I understood that the bonds were not to be paid—that the courts had decided against them. Knew the assessments hadn't been paid.

Marcus Hardy testified as follows:

Testimony Marcus Ha

I live at Hulls, in the original levee district, and have lived in the district since 1875. I was at the 1876 break, near Hannibal. I don't think the old levee commissioners were at the break. The commissioners, prior to that time, were Jones, Westlake and Wheelock. I know them personally. There was a large force on the levee near Hannibal at the time of the break, and they worked all night. After about that time I never knew the commissioners to take any charge or control of the levee. I never knew them to have a meeting of the commissioners, nor make any report to the court.

At the break of 1876 the land owners, as soon as they got there, took charge of the forces and worked by private subscription, and filled up the break. It was attempted to get 60,000 acres in the deed of trust, but it was impossible to get more than 30,000. People down there entered the bottom under the inducement held out to them by the construction of the levee, and had put much on the lands in the way of buildings, fences, houses, and other

timony of improvements, and the break ran them out. The question was whether they ought to abandon the levee or take hold of it and keep it going with their private means.

I afterwards became levee commissioner and am now one of the commissioners, and have been a collector for the district.
287 *a* I cannot give the exact amount of money we have expended on the levee, but will say in round numbers, about $400,000. The most serious trouble with the levee was the faulty foundation; and it was also considered not high enough. We have put a puddle ditch in a great many places at the toe of the levee. It is an expensive job and not so good as when put under the center of the levee. There were some places we could not do much good with the ditch, because the sand was so deep we couldn't get through it. We have what is called an annual assessment of benefits. The assessments were not large enough but were usually too high for the people to pay.

On cross-examination witness testified:

The annual assessment is levied for purpose of keeping the levee in repair. We could not have gotten along without it as we could not have put the levee there that would have been serviceable any length of time, without some repairs. I put my name on the petition although I owned no land. It would do no harm if it did no good. Made more money by buying and selling land than by trying to farm it. The theory of the assessments is that there should be an equitable assessment made against the lands to build the levee and a like assessment to keep it in repair. I understood the work was to be paid for by the issuing of bonds to the contractors at 90 per cent. After 1876 there were none of the levee taxes collected that I know of. There has been much grumbling over payment of new assessments.

timony of William Gay, called. William Gay, being recalled, makes a statement of twelve additional land owners whose names were not on the original petition.

George W. Jones, being recalled, examined by Judge Green, testified as follows: Testimony George W. J. —Recalled

I have already testified in this case. I was one of the original commissioners. The bonds issued by the district were all
288 *a* dated the same day, I think, as well as I remember, October 1st, 1872. They were delivered to the contractors, Skelsey, Fuller & Pierce, from time to time, as the estimates were furnished us by the chief engineer. I understood from the contractors, and from representatives of the bondsmen upon the bond of the contractors, that they had obtained the opinion of Hon. Judge Skinner of Quincy, Leonard Swett and Lyman Turnbull, of Illinois; G. T. Lothrop and John Atkinson, of Detroit, Michigan, in regard to the question of the validity of those bonds. (Mr. Jones identifies the pamphlet marked "Exhibit A" and the opinion on page five thereof rendered by Leonard Swett.) I recognize the opinion signed here, purporting to be delivered by Leonard Swett and presume he wrote it. I remember to have seen the manuscript opinion by Leonard Swett, it was brought there by Skelsey, Fuller & Pierce, or some one of them, and was read by myself and other parties. As I remember it we were to pay the Sny Island bonds at 90 per cent. of their face value, on estimates to be furnished by the engineer. They had to find a market for them and they got out this pamphlet. I have no knowledge of the date of the original opinion by Swett unless it is September 2nd, 1872, the date named. (Another pamphlet marked "Exhibit B" is shown Mr. Jones and his attention is called to pages 10 to page 17.) I know Mr. Atkinson, whose opinion appears to be on these pages. He was an attorney at Detroit and I remember his being at Pittsfield in connection with the proposed issuing of bonds. He made
an examination of the papers of the county court so far as they
289 *a* related to the proceedings in the Sny Drainage case. He frequently conferred with me there. I think Mr. Atkinson himself was one of the bondsmen. I think Mr. Atkinson made a very thorough examination. The bonds were given Sept. 4, 1872.

On cross-examination, by Gov. Palmer, witness testified:

Mr. Atkinson is not one of the makers of the original bond, but he is on the second bond. The issue of bonds began in 1872 and the last was issued, on the second series, in 1875. (It was agreed that the copy of another pamphlet or publication contain-

timony of
rge W.
Jones,
called.

ing the information above referred to shall be given to Mr. Jones and when identified by him delivered to the stenographer and become a part of the evidence in the case.) (Mr. Jones is shown the certificate issued by the commissioners on page 7 of the pamphlet and now states that the statements therein contained were believed by him at the time to be true. It was agreed that the above pamphlets themselves should be considered evidence in the case.)

290 *a* Hon. John M. Palmer and Louis Palmer, Esq., appearing for Complainants, and Messrs. A. C. Matthews, Harry Higbee and Thos Worthington, appearing for Defendants.

timony of
iel Haffner

Daniel Haffner, examined by A. C. Matthews, testified as follows:

I have resided in Hannibal, Mo., for many years, and own about 300 acres of land on the bottom directly opposite Han-
291 *a* nibal, about one-half of which is in the levee district. I signed the deed of trust after the first break in the levee. I also signed the petition for the organization of the district, with the understanding that a levee would be built by assessments on the land under the law, at a cost of about five dollars per acre, and that it was to be kept up by a system of assessments against the land benefited. But for this I would not have gone into the undertaking, as I cultivated my land and raised some crops before the levee was built. The first levee did not give protection, it was not high enough or strong enough, and broke in '76. That break demonstrated that the levee was insufficient. The breaks affected the price of land. I heard of the decision of the Supreme Court holding the levee proceedings unconstitutional.

After the building of the levee (the upper part of it), there was no high water for two years and the price of land went up; after it broke the price fell flatter than before the levee. I remember one piece of land near the gravel road that sold for $20 an acre before much of the levee was built, and after the break you could not have sold it for as much. I had possession before the levee was built and have continued that possession until now and my ownership of the land, and have paid my state and county taxes and levee assessments. Have 15 years continuous tax receipts prior to 1890. (Deeds of witness' land offered in evidence giving description, etc., and regular on their face). I have recog-

nized no other party as having an interest in or claim upon my land, and have not recognized the validity of any assessment on account of the old levee bonds since the decision of '76; and have had no conference or transaction of any kind with any holder of bonds or their attorney. (Witness produce his tax receipts for 15 years or more.) Testimony Daniel Ha

292 *a* During the high waters of the last break we had gangs of men all up and down the levee trying to keep the water from running over the top, etc. The railroad officials also employed men and we worked into the night. They would get dirt from the land side and strengthen the levee. About a half mile below it ran over and tore the levee all to pieces. It was the break of '88 that ran over the top of the levee. Everything was destroyed; it washed away a two-story house on my farm. I actually believe they (the land owners) have lost as much as they have made; every man that had no other dependence for a living that owned a farm there has busted and gone, that is a fact. All the men who were living on the bottom and depended on that for a livelihood are mostly broken and gone.

M. D. Massie, examined by Thos. Worthington, testified: Testimony M. D. Ma

Witness produces deeds to his land and a number of tax receipts, and deeds for land owned by his wife, Mary E. Massie, one of the children of Amos Morey, deceased. Witness produces a large number of tax receipts showing payment of taxes on his own lands and those of his wife since their ownership began. They had possession of their respective lands under regular deeds offered in evidence and have paid taxes on them continuously for about 15 years. Witness heard of the decision in the Webster case, and since that time he and his wife have not recognized the validity of the levee bonds, nor have they held their lands in subordination to them. They have held their lands in possession as their own absolutely as against any claim.

mony of
. V. Wills.

A. V. Wills, examined by A. C. Matthews, testified:

Witness introduces quit-claim deed to his lands, regular on its face, dated Feb. 20, '75.

Senator Palmer: Where the parties produce their deeds
293 *a* and testify that the taxes have been paid, it may be regarded as satisfactory, and the tax receipts need not be produced unless I request them.

I have been in possession of these lands since they were purchased about 20 years ago, and have paid all state and county taxes and levee assessments on them.

Cross-Examination.

The grantor in my deed is my brother. We bought the lands together from Lyman Scott, of Leavenworth, Kansas, and my brother took the deed and subsequently conveyed one-half to me and later I bought the other half from him. At the time we bought I knew there was a levee there, and that it had been built by bonds sold; but think when I made my purchase I understood the law had been declared unconstitutional under which the levee had been constructed. I never inquired the amount of those assessments.

I think I signed the petition for the organization of the present district, and I suppose I understood that the levee was to be used by the new organization. For ten years I was commissioner for the present district and had work done on the levee; I was not one of the first set of commissioners under the new organization. We continued in possession of the levee derived from our immediate predecessors. My land was occupied by tenants. From '81 to '83 it could scarcely be rented at all; but I kept possession and tried to farm it myself. The levee board of commissioners who preceded me were J. H. Brammel, Alfred Stebbins and Rufus M. Murray.

lation.

294 *a* Stipulation.

It is stipulated by and between parties that all the witnesses may produce their deeds, or in the absence of the deed, the record of the same, testify to the payment of taxes and possession, and the tax receipts to be produced only when required.

JOHN REED, examined by Thos. Worthington, testified as follows: Testimony John R

I have lands in the levee district and live on land adjoining which is not now included in the district. Witness produces numerous tax receipts, and Senator Palmer waives the production of his deeds. From pages 14 to 16 witness gives description of his lands, approximate date of purchase, from whom purchased, etc.

I have had exclusive possession of these lands, not recognizing any other title or claim since the time of my purchases, and have paid taxes continuously since I purchased. I owned all the land before the levee was commenced, and have known the condition of this bottom sice '52 or '53.

Stipulation: All exceptions reserved. Stipulation

It was good farming land. I paid a good price for it before the levee was heard of. I have lived on a part of the land in or immediately adjoining the district continuously since '60, and for about 20 years where I now live, which is on adjoining land. Most of my land was above the water caused by the break of '76, but on the lower lands crops were destroyed. The breaks of '80, '81 and '88 covered more of my land. My land was of more value to me before the levee was built than it has been since, simply from the fact that the levee being built has filled the Sny up and the creek I live on overflows my land ten times as often as the river did before, twenty times as often, I might say. It was not overflowed then by the creek; now the Sny has filled up and with every 295 *a* little rain it runs over. I have a levee 6 or 7 feet high along the creek all the way and still it breaks through. It is my opinion and that of my neighbors that the levee has not improved the value of our land. I heard of the decision in regard to the levee bonds, that they were worthless, no account. Testimony John R

Cross-Examination.

My full name is John Robert Reed. I think I bought two pieces before and there was some talk of the levee when I bought the rest—some talk of the levee being built. My land is nearly six miles from the levee. I knew that the building of the levee was contemplated, and I remember that Maj. Clark called and ad-

Testimony of John Reed

dressed some meetings. Think I was present at one or two meetings; don't know whether it was before the levee was commenced or since. Think I was present at the meeting at Hulls and one at Polhott's. Mr. Clark seemed to be managing the construction of the levee. I don't recollect signing any petition; I was present when the jury made its assessment, and knew that my lands were assessed. Think I paid one or two of the first assessments, but no more when we heard the tax was contested. Don't remember amount paid. It appeared there was a time when there was no organization. Then the deed of trust was started, and I signed it as to one 40 acre tract. Don't know the amount of the old assessment. Don't think I signed the petition for the new organization. I did some work on the levee when there was danger and paid my assessment, and knew that the levee had been built higher and stronger in part along the old levee. I paid my assessments for filling the levee, but resisted and fought the last special assessment, and only paid what the court compelled me to. The contractors said they would protect us from the '51 water for $5.00 an acre, and I told them I was willing to pay that if they did it, and I may have signed something; I think what I signed was the deed of trust. I have no education and have to take what other people say.

Testimony of J. K. Scarborough.

296 *a* J. K. SCARBOROUGH, examined by Thos. Worthington, testified:

Pages 24 to 27, witness produces deeds for his lands, and same are offered in evidence. Deed from Edward Seymour to witness dated April 8, '85, being a statutory warranty deed conveying to witness the undivided half of the west half of Sec. 30, Tp. 4-7, and the south half of Sec. 25, Tp. 4-8, contains the following special clause: "All covenants of warranty herein, shall not apply to levee assessments or taxes or levee bonds; but all bonds, taxes, liens and assessments for levee purposes are hereby assumed by the above named grantee and are to be paid by him." Witness and his grantors have had continuous possession of all said lands enumerated in his testimony, for at least 15 or 20 years, under deeds offered in evidence, and has paid all taxes assessed on them continuously from that time, except as to lands bought of Mr. Spencer, and I suppose that he paid those taxes.

(Senator Palmer: I will consent that Mr. Scarborough's statement as to lands bought of Mr. Spencer, that he supposes the taxes have been paid, shall be accepted as his testimony—that his statement shall be accepted as true as to the Spencer and Selms land.) My possession has been open, notorious and exclusive and never contested by anybody. Witness had previously testified in this cause.

Testimony J. K. Scar-

Cross-Examination by Senator Palmer:

I think I did not sign the first petition. I was not present at the meeting in Spencer's barn. Think I signed the second petition and that I signed the deed of trust. I didn't know whether I knew that Mr. Spencer signed the first petition or not. I paid the old levee assessment for probably two years; I paid as long as anybody did. Don't remember whether I signed the petition for the present organization. When I bought a part of my land I knew that bonds had been issued and an assessment made to pay them.

Testimony Joseph C. Harr

297 *a* JOSEPH C. HARRISON, recalled, examined by Thos. Worthington, testified:

My lands were described at my former examination. Witness again gives description of them. My titles are all based on tax titles, and I obtained them in '74 or '75. I have been in continuous possession of my lands since their purchase, and have paid taxes on them regularly each year, until I sold them in '93 to John McDonald, and the original assessment on W. ½ 24. I bought my land at fifty cents an acre, and sold it in '93 for five dollars an acre, after I had erected a dwelling house on it and broke the prairie sod and put it all in cultivation. It is worth $2.50 to break prairie sod. The land I bought in '80 I paid one dollar an acre for and sold in '93 for $5, with all the improvements. I did not pay any of the original assessments under the old organization, nor did I sign any of the petitions referred to. I heard of the decision in the Webster case in '76, and when I bought that part of my land bought in '80 it was with the supposition that the old original assessment was invalid. I have previously testified in this case.

Cross-Examination, by Gen. Palmer:

When I bought my first land I knew there was an assessment on the land to pay bonds. Bought by quit-claim deed and nothing in it was said about the assessment. When I made my last purchases in '80 and '82 the land was not subject to assessment; I perhaps paid two of the old assessments on the west half 26.

I never heard of a suit again Wheelock, Jones and Westlake; the only one I knew anything about was the Webster case. I did not sign any petition for the formation of the levee district; I then

Testimony of W. C. Harrison.

lived in Hardin. I never did any work on the levee. I knew that the new organization had taken possession of the levee. I never paid any of the old levee assessments after the decision in the 298 *a* Webster case, and did not hold my lands subject to them after that decision and I did not consider the lands I bought in '80 and '82 subject to those assessments. The assessments I considered them subject to were those under the new law. I knew the old assessments had been made, but the court had declared them off. I don't know that I ever knew anything about the bill filed in the U. S. Court against Jones and others, and I have never had any knowledge in regard to Judge Drummond's decision.

Testimony of Thos S. Gill.

THOMAS S. GILL, examined by Thos. Worthington, testified:

I live in Bellevue and own the southeast of Sec. 13, 8-4, which I inherited from my father in '52. I have had continuous and uninterrupted possession of the land since '71. And I have paid taxes regularly on the land since that time. I paid two assessments, I think, under the old organization to the collector in Calhoun county. I heard of a decision of the Supreme Court in which they declared the levee unconstitutional and didn't pay any assessments after that; and didn't recognize any title superior to my own in that land. My possession has been open and notorious.

Cross-Examination by John M. Palmer:

No one lives on the land; it is low and not fit to live on, but has been fenced in several times. I have 50 acres of it in cultivation. I saw men at work in constructing a levee, but never worked on it myself. Knew there were assessments levied on the land—the amount was small. I paid two. Have never done anything on the levee myself. Never signed any petitions with reference to the levee. I have never paid any assessments under the present organization. I am one of the fighters and always have been.

299 *a* STEPHEN McDONALD, examined by Thos. Worthington, testified: Testimony Stephen McD

Witness produces various title deeds to lands, some of the tracts being owned by himself individually, and some in common with his brother, John McDonald. I bought some of the land in September, '76. Pages 42 to 44 witness exhibits title deeds to land, shows when purchased, etc.

I have paid taxes on all these lands since I have owned them regularly every year and have the tax receipts. I heard of the decision in the Webster case in '76, and have not paid any assessments under the old levee law since that time. My possession of said lands since said purchase have been open and adverse to every one since I purchased them, and has not been disputed so far as I know. I did not sign any of the petitions referred to in this case. I was county judge of my county for some time. Some of the citizens in our county were in favor of the levee and some opposed, I think.

Cross-Examination, by John M. Palmer:

Paid the original Sny Levee assessment probably for two years. I knew of the scheme for the construction of the levee; was not asked to sign any paper in regard to it. I knew there were assessments against some of the land; most of my lands are in the district, but some were never assessed. A part of my lands are in the present district, and I paid assessments to it when I couldn't get them thrown off or compromised. I had heard that the court had ruled against the original assessment. I probably knew there was a suit by Palms against Jones, but I cannot recall anything in relation to it. I do not believe I knew there was a decree against them. I was not present at any meeting in regard to the old levee. I knew of the scheme for leveeing the bottom and read of the act of '71 that was declared to be unconstitutional. I understood the new organization had taken possession of the old levee. Witness states facts in regard to the land owned by kimself and brother.

Testimony of Edward A. Glenn

300 *a* EDWARD A. GLENN, examined by Thos. Worthington, testified:

I live in Louisiana, Mo. (Witness produces deed from Edward Prince, dated Sept. 20, '86, for the whole of Sec. 21, Tp. 7-5, and knows that said grantor had owned said land at least since '80.) I bought certain other lands, described by my deed, in Secs. 18, 19 and 20, Tp. 7-5 of Joseph M. Thurman. Thurman was my uncle and owned said lands. The Thurman land has been in possession of myself and Thurman continuously for more than seven years prior to '89, and my own knowledge of the Prince land is that it has been in possession of Col. Prince and myself from '83 and I have learned from others that he owned it some years prior to that time. I know that the taxes on all of this land have been paid continuously as far back at least as '81, and down to the present time, and I have no doubt they were paid prior to that. At the time I purchased these lands I did not know that any bonds had ever been issued or any suit instituted or any trouble at all. I did not learn that until recently, within the last five years at least. There was never any personal service of summons on me in this case. Myself and my grantors have had open, visible adverse possession of all of these lands since 1880, at least.

Cross-Examination, by Louis Palmer:

I have resided in Louisiana about all my life and am 33 years old. I never heard how the old levee was to be paid for, never heard anything about it. I was quite a child when it was built. I knew the lands I purchased were in the district. I got a straight warranty deed and thought it was all right, and was not aware that there was any lien of any kind or description
301 *a* against it. The 40 acres of Hoffman land was not bought until Jan. 11th, '90, and I can't say whether I had heard of the pendency of this suit at that time or not; the other lands I purchased in '86, and knew nothing about the pendency of the suit then. I was not at all interested in the levee as a boy, and did not come of age until Dec. 15, '82, and bought all of my lands except the 40 acres in '86. I bought these lands (of my uncle) without consulting anybody, without even telling my father about it, and took a deed for them. My best impression is that I first learned of this suit early in the year '90, and I was then told that some papers had been served in the fall preceding. I am in the coal and wood business. My grandfather had at one time owned these lands, and I supposed it was all right, and bought without consulting anybody.

Testimony John W. Jenni

JOHN W. JENNINGS, examined by Thos. Worthington, testified:

I owned an undivided 30 acres in the northeast quarter of Sec. 2, Tp. 8 south, 4 west, which I inherited from my father, who died in March, '79. I and my co-tenants had continuous possession of the land until '83, when we divided it, and I have had continuous possession since that time. There were fences on it and we built on it. The taxes have been regularly paid in each year since my father's death in '79. My father was in possession at the time of his death. My recollection of the possession of that land by myself and my father extends back for about 23 years, and I know it has been inclosed by a fence at least that long. I had nothing to do with the old levee assessments, that I recollect.

Cross-Examination, by Louis Palmer:

I can remember of seeing men at work on the levee. I became of age in '82. I remember hearing them talk about the Webster suit a good deal, but don't know the year. I never
302 *a* heard the bond question talked of until after I got possession of my land. Didn't learn of the suit of O'Brien and others against Wheelock in the United States Court until after I got this notice.

Testimony Harrison Bro

HARRISON BROWN, examined by Harry Higbee, testified:

I have owned the northeast quarter of Sec. 7, Tp. 5 south, 6 west, since '67, and have paid taxes regularly each year, and have been in possession of it ever since. It has been fenced since '62. My possession was adverse to every one. I heard of the decision in the Webster case, and understood that the bonds were not legal. Think I heard of suit of Palms and Wheelock about the time it happened.

Cross-Examination by Louis Palmer:

I think I signed the petition of '72. Don't think that I took any stock in the incorporation prior to '71, but knew of it. I heard Mr. Clark speak once at New Canton, probably in '71, and he read the law that had been passed. I didn't sign the deed of trust, and don't think I signed the petition of '80. I knew that my lands were assessed in the levee district and that bonds were issued, and I paid assessments under the new organization. Under

Testimony of Tyson Brown.

the old organization I paid one assessment, and don't think any man in our township paid any more. I think the benefits on my lands were assessed at five dollars an acre. I suppose I had notice of the formation of the district, and perhaps knew that the levee was to be a part of the new organization. After the break of '76 I sent a team and worked five days on the levee. I attended the meeting at New Canton, and Mr. Clark read the law, and he explained that the object was to construct and to keep up the levee by assessments against the land, and when I signed that first petition I relied on both of those propositions. My land was high and I raised as good crops before the levee was built as since.

Testimony of H. Atkinson.

303 *a* H. B. ATKINSON, examined by Harry Higbee, testified:

Witness produces deeds and descriptions purchased by himself Oct. 20th, '83, of B. H. Atkinson, executor of the last will of R. M. Atkinson, deceased. I have been in possession since that date, and my father was in possession since '80 as executor of my brother's estate. All taxes have been regularly paid on these lands since '80 at least. Pages 67 and 68 witness produces a number of deeds for various tracts of lands to R. M. Atkinson.

I went to New Canton to live in '76, and paid the taxes from that time for my brother on his land until his death, and am satisfied that he had possession of each of the tracts from the date of the original date of the deeds to him as stated herein. I have receipts here for taxes on all these lands since and including '80, and I am certain of the possession at least for the same time. Other lands described by witness. The land in Secs. 11 and 22, 6-6, I bought at tax sale.

I bought the southwest quarter of Sec. 32, Tp. 5-6, of Geo. M. Atkinson, Sept. 24, '94. This land he derived by will from my father, B. H. Atkinson. I had bought it at the administrator's sale of my brother's estate in '83, and had conveyed it to my father. I know there has been continuous possession of and payment of taxes on that tract since '76. The same is true of 25 acres in the southwest quarter of Sec. 18, Tp. 6-5. The possession has been open and notorious. Other lands described and deeds shown.

I did not sign the petition of '71, nor that of '76, nor that of '80. Prior to '83 I only owned one tract, which was deeded to me by my brother. I may have signed the petition of '80, but

don't now recollect it. I heard of the decision in the Web-
304 *a* ster case in regard to the validity of the levee bonds, power to collect assessments, levy taxes and pay the same. After that I thought they were of no force and no lien on the land, otherwise I would not have bought any land. My understanding was that they were free from anything back when I bought my land. Never recognized the validity of the old bonds. Since '83 I have expended in improvements on the northeast quarter of Sec. 14 over a thousand dollars, and have receipts for expenses of $764 on that one quarter. I have kept an account of receipts and expenditures on all of those lands, and it has been a question in my mind for a good while whether or not I had not better let the commissioners have them.

Cross-Examination, by Louis Palmer:

I knew of the building of the levee; then resided in Pittsfield, in the hardware business. I knew but little of it until I went to reside at New Canton. Buddle H. Atkinson, now deceased, was my father. Geo. M. Atkinson was my brother, and Richard M. Atkinson, deceased, formerly county judge of this county, was my brother. My father owned no lands in the district until '83. Since '76 my brother would send me money to pay taxes, etc. I knew of my brother's ownership of lands in the district. I did not own any lands until '83, except 120 acres of little value conveyed to me in '75. I don't know of paying any assessments for interest of Sny bonds. Since '76 I have known what occurred with reference to the levee, in a general way. I had heard there had been an issue of bonds, perhaps about the time they were issued. I knew the levee had been constructed. I said that the improvements, such as fences, lumber, etc., on one tract had cost me $764, not including taxes and assessments. I owned about a thousand acres of land, and my accounts show a loss on all of them except one tract. I think they are an average condition of the land
305 *a* there, but they are better now than before. In the last few years there has been some profit. When I bought my land I supposed that the assessments has been wiped out clean by the decision in the Webster case; considered that I was buying land free from everything. I had heard of the assessments, but in purchasing my lands I didn't think there was anything against them, and I would not have gone into Sny lads if I had thought there were. The decision in the Webster case was a matter of general discussion at the time among parties owning land in the Sny levee bottom, and was generally discussed since. It was my under-

timony of D. Atkinson

standing, and generally considered, that that decision ended the validity of the bonds, and that they were not thereafter a lien on the lands. That was taken into consideration in fixing the value of the land since that time. Since '76 the land owners considered they were entirely free from old bond troubles, until '89, when summons was served on some of the parties in this cause. Men dealt in lands with that understanding. I heard of the Webster decision shortly after it was rendered, and I considered that was the end of the matter. I had heard about the assessments and the bonds. I had heard of the suit commenced by Francis Palms in '78, and heard it was in connection with the bond suit. I suppose I assisted in making some repairs on the levee. I don't think I joined in the trust deed. I moved to New Canton in '76, and the decision in the Webster case was then a subject of general discussion.

Examined by Harry Higbee:

I knew no steps had been taken in the Palms case for a number of years, so far as the people here knew, and it was the general impression that it had been abandoned. I just thought Palms had bought a lot of bonds and they proved to be worthless, and I didn't see any reason why I should pay them or any one else. I understood the trust deeds were to repair the old levee. On examination witness states he signed the petition for the new organization in '80.

timony of ge W. Long

306 *a* GEORGE W. LONG, examined by A. C. Matthews, testified:

I live in Calhoun county, and sold my interest in the bottom lands last year. Prior to that I owned two tracts in the district. I paid two assessments on the land. The land is in Sec. 2 and 13, Tp. 8-4. I bought my land in '72, and since that time until my sale to Perry Day in '94 I paid all taxes on it each year, and had continuous possession of the land. I knew this land and land in the neighborhood before the levee was built, and don't think that the levee had been of any benefit to those lands. Perhaps some of the higher class of land near Hamburg Bay may possibly be benefited. The lower lands are frequently submerged by back water and water from the creeks. That part of the bottom is a basin with the higher slopes towards the river and the bluff. I think 90 per cent of the lands in that part of the district are not in any way benefited by the enterprise.

Testimony George W. I

Cross-Examination, by Louis Palmer:

I knew there were levee commissioners appointed in '72, and my brother and I paid two assessments, I think, when we understood there was a suit in the Supreme Court in regard to the validity of those bonds, and they were declared unconstitutional, and we stopped paying, but were sued for them at one time. I have not paid assessments since that time. Mr. Webster was a party to the suit that went to the Supreme Court. I have heard about the Palms suit. My lands were in the old levee district. We pay no assessment to the new district; have resisted payment. The levee is seven miles from my residence; never assisted in repairing it.

Testimony Stephen McDon —Recalled

STEPHEN McDONALD, recalled, examined by Thos. Worthington, testified:

Witness gives a statement of the lands owned in common by himself and brother, John McDonald. Purchased the northwest quarter of Sec. 2, 8-2, June 22, '77, by tax title, and within 307 *a* a year thereafter conveyed the undivided half to my brother. We have paid the taxes continuously from that time. It was not inclosed and not in possession until about five years ago, but we claimed ownership over it. Other lands described. Testifies to payment of taxes and possession of other lands. The southeast quarter of Sec. 23, 8-4 was purchased at sheriff's sale on execution by John McDonald, deed dated July 5th, '77, and shortly thereafter he conveyed one-half to me, and deed produced. We have paid taxes on it regularly since that time, but it was not in possession of any one prior to the beginning of this suit. I purchased the S. W. of 3, 8-4 of W. A. Kendall, May 5th, '77, and shortly thereafter conveyed the undivided interest to my brother John. We have had possession of that tract adverse to everybody since it was purchased and paid taxes regularly on it each year, except in '79, when it was allowed to go to sale, and we obtained a tax deed dated May 25th, '81. Since that time the payment of taxes has been continuous. The N. E. of 10, 8-4, purchased June 20, '77, by John McDonald, and he conveyed me a half interest July 5th, '77. We have had possession continuously and have paid taxes each year ever since that date. Witness describes other lands purchased Oct. 6th, '91. Witness gives description of lands of John McDonald. Dates of deeds, etc. Has deed to the N. W. of Sec 4, Tp. 8-4, obtained from the estate of John Reed, Sept. 22, '84, and has had possession and paid taxes ever since. The N. W. of 10, 8-4, pur-

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McDonald.
alled.

chased from John McConnel, July 1st, '76, and has had possession and paid taxes since that time. N. W. of 11, 8-4, purchased June 20, '77, and other descriptions given. They are the class of lands that get the least protection from the levee, and all of those in Calhoun county are subject to back-water, and all but a small portion of two tracts were under back-water in '92.

308 *a* Cross-Examination by Louis Palmer:

I heard of the formation of the levee district, did not attend any meeting held by Mr. Clark; was aware there were assessments against the land for some purpose of building the levee in some way or other, and knew of levee bonds. If the complainants had any rights in the land when I bought it, then I suppose I bought subject to those rights. I knew of the bonds and I knew of the suit to see whether they were good or not. I don't think I knew of the suit of Palms against Wheelock begun in '78. I was a land owner in '78. I paid the two assessments under the old district because I held my land by tax title and I was afraid not to pay the assessments. I knew of the decision in which the bonds were held unconstitutional, and after that I did not recognize there was any lien on my land, and after that there was no attempt to collect any levee tax. I considered the decision of the Supreme Court virtually settled the question as to the validity of the bonds and so thought little about it until the institution of this suit, which seemed to have been in '89.

mony of
. Munger.

W. A. MUNGER, examined by Harry Higbee, testified:

I reside in Hannibal, Mo., and in common with my brother (L. B. Munger) own lands in the Sny levee district. Witness produces deeds, tax receipts, memoranda, etc. The first tract we purchased was by deed from the administrator of Josiah Thompson, dated Dec. 30, '76, for the West half N. W. quarter Sec. 3, Tp. 4-8, and have paid taxes on it continuously from that time, and have had continuous possession since our purchase. Suppose Thompson had had possession for at least 15 years prior thereto, to my knowledge for ten years. Witness produces deeds dated January 15, '79, for the east half of Sec. 1 and the N. W. quarter of Sec. 7, Tp. 6, R. 7. The deed for the east half of Sec. 1 is from

C. N. Clark and wife and is a general warranty, subject to
309 *a* assessments under the deed of trust to George W.

Jones and others, and with the following exception to the clause of warranty: "Except the assessment made to pay the Sny

Levee Bonds." We have paid all taxes from the date of said purchase and have had continuous possession thereof since that time; I think Mr. Clark's possession prior to my purchase dates from '71 or '72. Witness produces quit-claim deed from C. N. Clark and wife dated Jan. 15, '79, to the N. W. quarter of Sec. 7, Tp. 6-7. We have paid taxes continuously for each year and had possession from that date; think probably Mr. Clark's possession reached back to '72.

Witness produces deed from Edward Prince and wife dated Jan. 24, '80, conveying to himself and brother the north half and the S. W. quarter of Sec. 3, Tp. 4, R. 8, it being a warranty deed with the following reservation: "This deed shall not be considered to be a deed of warranty against any claim, assessments, liens or taxes growing out of or in any way connected with what is known as the Sny Island Levee, further that the grantors shall pay the taxes state and county for the year '79, but not the levee taxes."

We immediately took possession, and the possession of ourselves and grantors has been continuous since '65, and we have continuously paid all taxes from the time of our purchase and our grantors paid before. Witness produces warranty deed from R. E. Arthur, dated Dec. 7, '81, conveying to himself and brother Lyman P. Munger the E ½ of the S. E. of 4-8. We have paid taxes continuously since that time and had continuous undisputed possession, and our grantor had possession for 8 or 10 years previous.

Witness produces deed from J. H. Dickerson to himself and brother dated Aug. 14, '82, conveying the S. W. fractional quarter of Sec. 1, Tp. 6, R. 7, containing 60 acres more or less, 310 *a* and the N. E. fractional quarter of Sec. 12, containing 75 acres more or less, all of which last tract is outside the levee except about 12 acres. We paid taxes annually after our purchase, and immediately took possession, and have continued in possession.

Witness produces patent from the State of Illinois, dated Oct. 5, '84, conveying lots 6 and 8 in Sec. 16, Tp. 5-7. We have had possession since that time and have continuously paid taxes. Previous to our purchase the lands were not subject to taxation. Witness produces deeds from the Master in Chancery of Pike Co. dated Oct. 9, '85, to himself and brother conveying all the interest of William H. Hyde and wife in the N. W. ¼ Sec. 36, Tp. 5-7; also deed from John D. Horn and wife, for the same premises

ny of unger. dated Feb. 15, '84. We have paid taxes continuously from year to year on said lands since that date and have had possession, occupied and improved it.

Witness introduces patent from U. S. to Edward Prince dated March 24, '71, conveying west half Sec. 34, Tp. 3-8, and deed from said Prince and wife dated June 11th, '84, conveying to himself and brother all of said land lying north of the railroad, being 240 acres; it is a warranty deed with the following reservation: "The covenants of warranty herein contained shall not extend to a warranty against any claim or claims arising out of levee taxes, or any claim for State or County taxes, which State or County taxes became a lien since the 8th day of Nov. '82. We have a deed for the rest of that half section, coming through Samuel Thompson, dated Sept. 8, '85. We have paid taxes continuously and had possession ever since our purchase. Our grantors had had possession of the tract nearly 15 years prior to our purchase.

Witness produces quit-claim deed from Amos J. Stillwell 311 *a* dated Dec. 11th, '83, conveying to himself and brother the N. W. ¼ of Sec. 2, Tp. 6-6. This title starts with a tax deed to Mr. Stillwell in '80, and he conveyed to us as above stated. The tax sale was made in '81 for the tax of '80 and Mr. Stillwell's deed is dated Sept. 22, '83. Witness produces copy of tax sale notice by A. J. Stillwell and affidavit of R. S. Will of the service of the notice dated Aug. 23, '83. This affidavit was filed in the office of the County Clerk of Pike County. We took possession of his land in the summer of '83, have no other title to it than above stated and have had continuous possession and have paid taxes regularly since our purchase.

We bought all of our lands since the decision in the Webster case in '76, and I heard that by virtue of the decision the law was declared unconstitutional. I had a good many acquaintances interested in lands on the bottom and heard it discussed. After that it was entirely dismissed from consideration until '88, as I remember it, when some one came from Detroit, I think, to look over the matter, and it was then it first came to my knowledge that there was any indebtedness claimed against the district. All of these lands I have mentioned were acquired prior to that time, though we have acquired some lands since. We were in no way connected with the building of the levee, but knew of it; our acquaintance with land owners in the district for some years has been quite extensive.

Cross-Examination by Louis Palmer: Testimony W. A. Mu

At that time I was slightly acquainted with Maj. Clark and knew something of the progress of the levee; knew that levee bonds had been issued. We knew there had been an old issue of bonds; the universal understanding was they were invalid, 312 *a* and in making out one or two deeds a special clause was put in exempting the warrantor from liability as above stated. I knew the fact that bonds had been issued, not the circumstances of their issue. I accepted deed from C. N. Clark, taking all chances as to validity or invalidity of bonds. At the time of our first purchase in '77 I knew that the land was in the levee district, but was not at that time posted as to the levee system of business. I think I signed the petition for the present levee district. I was not aware of the pendency of the suit instituted in '78 by Francis Palms against Wheelock et al. In '78 I did not know who were commissioners; I presume I knew there was an organization of some kind, but knew nothing of the details of the management. I knew there was a movement to build a levee under the new organization, but knew nothing about the title of the old levee, that was all prior to my knowledge of it. My first knowledge of levee matters was when I signed the trust deed, and then had only 80 acres of little value, and knew very little about the business. At the time of the organization in '80 we owned about 500 acres. The trust deed only covered 80 acres. I bought my land with knowledge that bonds had been issued to pay for the levee, but also with the knowledge that the law authorizing the building of the levee and issuing of the bonds for the organization of the district was declared illegal and void. I never heard of the present case, or the decree in the United States Court in reference to the matter, until '80, the time of the meeting in Pittsfield, when some Detroit man appeared on the scene. That was the first knowledge I had that anybody held any claim against the Sny Levee District for issuing these so-called bonds. I knew that Mr. A. J. Stillwell and his brother owned some levee bonds, and I had some conversation with the former with reference to them, which he bought, thinking them good investments. I think he had no faith in their ultimate collection, and heard from him shortly before his death (in '89) that he declined to be a party to this present suit, as he 313 *a* said it was sending good money after bad. I knew that after the decision of the Webster case the Stillwell family, with whom I am quite intimate, never regarded the bonds of any value, considered the matter hopeless. I did not know of the suit of

ony of Munger. Palms against Wheelock in '88 until the institution of this suit. I read the petition in this case, and have known it since perhaps '89. The first information I had of this decision of Judge Treat (Drummond) was in '88 at Pittsfield, on the appearance of this man from Detroit, and this was the first information the public generally ever had, as far as I know. I was one of the appraisers of certain levee bonds belonging to the estate of Brice A. Stillwell, before the decision in the Webster case.

ALBEON SHINN, examined by Harry Higbee, testified:

ony of Shinn.

I reside in the western part of Pike county. Witness produces title deeds showing conveyance from James S. Irwin and wife to himself of the S. E. ¼ of Sec. 36, Tp. 6-6, dated Aug. 4, '74, being a warranty deed with the following reservations: "The covenants herein shall not extend to any tax or assessments due after '73;" also quit-claim deed from William B. Shinn to witness, dated Nov. 22, '81, conveying undivided half of said land. We went into immediate possession and have had continuous possession and paid taxes each year since date of deed. Witness introduces deed from Susan F. Ramsey and others, dated Jan. 10, '74, to William D. Shinn and witness, conveying N. E. ¼, Sec. 25, it being a special warranty deed with the following clause: "The party of the first part are exempt from all levee assessments." We took immediate possession of the land and held continuous possession and paid all taxes until Feb. 29, '92, when we sold it to one John Schmitt. My father bought my brother's interest in this last tract, my father being William M. Shinn.

314 *a* I heard of the decision in the Webster case, and my understanding the levee bonds and assessments were decided unconstitutional. That was the general understanding in my neighborhood, and it entered into the consideration of parties in dealing with levee lands.

Cross-Examination, by Louis Palmer:

I knew of the levee bonds and paid perhaps two assessments, and knew the reservations in my deeds; knew that the reservations meant that purchasers would have to pay assessments if they were to be paid. It was everybody's understanding that the Webster case rendered the bonds unconstitutional; don't know when the bonds matured.

LEMUEL LONG testified: Testimony Lemuel

Witness produces title deed to three tracts of land in Calhoun county dated April 6, '67; have had possession of the land and paid taxes every year since that date. I live on a part of the land. Another tract was purchased Dec., '61, and deed produced by witness, being the N. half S. E. Sec. 12, Tp. 8-4. Have had continuous possession and paid taxes each year since that date. Witness produces deed for certain lands to his father, John Wilson Long, dated April 6, '67, and states that he inherited from his father an undivided interest in the land. I formerly testified in this case.

Cross-Examination by Louis Palmer:

We knew nothing about the building of the levee until after it was commenced at the upper end. We knew after of some assessments to pay bonds, but at first supposed they were going to leave Calhoun out. I paid the first two assessments under protest, because we thought we had to. Did not participate in the proceedings for the organization of the levee district, under the new law, but haven't paid any assessments under it. My father was one of the parties in the Webster case, fighting it all the way 315 *a* through. I and my father paid a part of the expenses in the Webster case, to fight it through. We have always fought the old levee and the present levee. It was the agreement for one man to carry on the suit and the rest were to back him up.

SAMUEL HOGSETT, examined by Harry Higbee, testified: Testimony Samuel Hogs

Introduces deed from Pike Co., under the Swamp Land Act, to James Hogsett, dated Nov. 27, '54, conveying N. W. ¼ Sec. 15, 7-5. Witness obtained his interest from his father through inheritance having purchased the interest of other heirs. The land has been in continuous possession of my father and his heirs since that date, and all taxes have been regularly paid each year, and I have with me tax receipts from '80 to '95. My father died in '68. I didn't sign the original petition in '71 nor the trust deed, and don't think I signed the petition for the present district, and don't think I signed any papers at all about the levee. My father died before the organization of the district.

ony of Cross-Examination by Louis Palmer:

I heard of the building of the levee and came into possession of this land in '68. I am the oldest of my family and have actual possession of it for about 20 years, but didn't buy out all the heirs until perhaps three years ago. Paid some of the first levee assessments; don't know how many, but quite a number. I knew of the formation of the levee district in '80.

ony of Higbee. HARRY HIGBEE testified:

Witness owns certain lands in the levee district; offers in evidence deed from Joseph Nower and others to C. L. Higbee, dated June 24, '74, conveying the S. W. ¼ Sec. 26, Tp. 5-6; also deed for the same premises to said Higbee from William Bloodgood 316 *a* dated Nov. 19, '73. Chancy L. Higbee was my father, and he died Dec. 7, '84, intestate, leaving his widow, Julia M. Higbee and two children, myself and sister, Sue W. Higbee. My sister died Dec. 13, '93, unmarried and intestate, leaving as her only heirs my mother and myself. Chancy L. Higbee went into possession of these premises immediately after the dates of the above deeds, and he and his heirs have had sole possession and claiming title to the present time. Witness presents receipts for all state and county taxes on said lands from '80 to '89 inclusive.

Witness also introduces quit-claim deed from James S. Irwin to said C. L. Higbee dated Dec. 29, '73, conveying S. E. 31, 5-6. Said Higbee immediately took possession of said premises, and he and his heirs have had continuous possession since that time, and witness produces tax receipts on the same from '80 to '89 inclusive. In '93 that part of said premises lying west of the Sny was sold to one Snyder, and my mother and myself now own that east of the Sny supposed to contain 65 acres.

Witness produces record of deed from the executors of James Fatzinger to Chancy L. Higbee, dated Jan. 17, '80, conveying all of Sec. 31, Tp. 7-4, except 16 acres in S. E. corner, containing 624 acres. James Irwin had an interest in said premises in common with said Higbee which he subsequently conveyed to the heirs of said Higbee. Said premises have been in the continuous possession of said Higbee and his heirs and said Irwin and his grantees from the date of said original purchase to the present time, and witness produced tax receipts showing payment of all state and county taxes from '81 to '88 inclusive. The lands were

inclosed and in cultivation for some years prior to the purchase by C. L. Higbee. The 40 acres of the said premises southwest of the Sny in S. W. 31 has been sold to Calvin Bruel, five acres lying east of the Pleasant Hill and Clarksville road have been sold to ———.

317 *a* Witness introduces tax deed from the County Clerk of Pike Co. dated June 4th, '77, conveying to William L. Myers the S. W. 33, Town. 3, R. 6; also deed from said Myers and wife dated June 6, '81, conveying said premises to Scott Wike and Harry Higbee. Said Myers took possession of said premises immediately after the date of said tax deed, and he and his said grantees have been in the undisputed possession of the same claiming title thereto from that time to the present. Said premises were fenced and a portion in cultivation, and had a house and out buildings most of the time. The house and buildings and fences were washed away by the flood of '88, but were replaced as soon as possible thereafter. Witness introduces tax receipts showing payment of all taxes by said Myers and Wike and Higbee from '79 to '90 inclusive. Witness owns one half of said premises and Scott Wike the other half.

Witness was familiar with the decision in the Webster case concerning the organization of the old levee district and the right to collect assessments to pay the bonds and interest thereon issued by the old district. I know the decision was generally discussed by people interested in levee lands and the fact that the assessments or the law was declared unconstitutional had an effect on the value of land in the district and was generally taken into consideration by parties dealing in levee lands. I cannot state exactly what effect, but I know from conversation with parties interested in levee lands that after this decision lands in the district were sold and had some value for sale which could not be sold prior to that time; that is, that there were purchasers after that decision when there were not purchasers before.

318 *a* Cross-Examination by Louis Palmer:

I am one of the counsel in this case, and have lived in Pike Co. since '54. Knew of the issuance of levee bonds. I don't know of any particular tract which sold for more after the Webster decision. About the time of the decision of the Webster case there was a break in the levee, which did a great deal to destroy the value of lands, and after the new levee district was formed, then values of lands increased. I knew of the suit of Palms against Wheelock and others instituted in '78, or learned of it soon after. Think I

bought my first land in '79, and inherited others from my father, who was the late Judge Higbee. My father knew of the issuance of levee bonds, etc., and I did when I bought my land, so our lands were taken with a pretty thorough knowledge of the issuance of bonds.

R. T. HICKS, examined by Harry Higbee, testified:

I live in Pittsfield and am cashier of the First National Bank. Witness introduces deeds from Edwin C. Bates and wife to Robert T. Hicks, dated March 1st, '86, conveying north half Sec. 33, Tp. 5-6, being quit-claim deed with special warranty against acts of grantors; also record of deeds of same date for same premises from heirs of Chancey L. Higbee to said Bates, and deed from Edward Prince to said Higbee for same premises dated Dec. 14, '74. Said Higbee and his heirs and grantees have been in possession of said premises from the date of said deed in '74 to the present time, and I have here tax receipts for taxes thereon for each year from '81 to '89 inclusive. At the time of my purchase I knew there had been a suit in regard to the levee bonds and they had been declared unconstitutional by the Supreme Court of this state. That was a matter of general discussion, and I paid with that understanding and paid good a consideration for my land.

Cross-Examination by Louis Palmer:

I knew Jones, Wheelock and Westlake and understood that
319 *a* they had once been called commissioners. I did not know of the suit of Palms against Jones and others commenced in '78, not until the present suit, filed I believe in '89. Don't know of any decree by Judge Treat in the case.

THOMAS WORTHINGTON, being recalled, testified: Testimony Thomas Worthington Recalled.

Witness has formerly testified in this case. Introduces deeds from Susan F. and Mary Ramsey to Caroline Long dated June 4, '74, conveying S. E. 25, and N. E. 36, 6-6, being quit-claim deed; deed from Caroline Long to witness as assignee, dated March 26, '85, conveying the east half and the S. W. ¼ of the S. E. quarter Sec. 25 and N. E. 36, same lands as above deed from Caroline Long by her assignee to Harry Higbee dated July 27, '86, conveying all of said lands; and quit-claim deed from Harry Higbee to said witness dated Oct. 21, '87, conveying the above land; also certain conveyances of the N. W. ¼ of said S. E. 25, including a general warranty deed from Elmer Miller to witness dated Sept. 20th, '92. Have been acquainted with these lands since '77 or '78, and know that they have been continuously in possession of myself and grantors since that date, and have been inclosed by fence except for brief periods when freshets from the river washed fences away, and were subsequently replaced. All taxes were regularly paid each year by myself and grantors on said N. E. 36, from '77 to '87 inclusive, and on S. E. 35 from and including '77 to and including '83, being 11 years on the former and 7 years on the latter tract. My possession and that of my grantors was open, notorious and exclusive, including opposition to any claims for levee bonds.

Witness introduces patent from United States to John Shepard, dated Feb. 9, 1818, conveying S. E. 2, Tp. 4-8; deed from said Shepard to Silas E. Shepard, dated Oct. 2, '46; certified copy
320 *a* of last will of Silas E. Shepard, dated Oct. 23, '77, and recorded in Pike county, Jan. 25, '88; deed from Catharine F. Harvey as executrix and residuary devisee of Silas E. Shepard to witness, dated Sept. 8, '87, being general warranty deed without any special clause; deed from Alma W. Kingsley, one of the heirs at law of Silas E. Shepard, dated Sept. 8, '89; common law record Pike Co., Ill., Vol. M., P. 215, showing judgment in favor of Catharine F. Harvey et al., rendered April 20th, '80, against Lambert & Sharp, in ejectment for possession of said premises. At the time of said ejectment suit said defendants were in possession of said premises as tenants of one Stillwell. The plaintiffs in said suit resided in Williamsport, Pa., and I do not find that they or their father took any part in any of the proceedings with reference to the levee or the assessments. They subsequently obtained possession of said premises under a writ issued out of said court in '80 or '81. Since that time the said Catharine F. Harvey had open and exclusive possession of said premises until the date of her deed, as

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ed.

above stated to me, and my possession continued until I sold the land on January 7, '92, to one Camery. I can state that from about January, '82, that these premises were continuously occupied as a residence by certain tenants of Mrs. Harvey and myself until '92. I know that all taxes were paid each year on premises from '82 to '88, both years inclusive. The possession of these lands were open, notorious and exclusive as against all the world. This property was devised by the residuary clause of said will of Silas E. Shepard, here introduced, to said Catharine F. Harvey, and I purchased from her Sept. 8, '87, as above stated, and then went into possession of said premises. I subsequently obtained a quit-claim deed from her sister. Before purchasing any of these lands I made a careful examination in the recorder's office in Pike county 321 *a* and found nothing indicating any incumbrance against them, and had an abstract of title. I never found anything of record to show that there were assessments levied against these lands for the payment of outstanding bonds, and there was nothing of the kind shown on the abstract of title. I was very familiar with the records of Pike county, having made many abstracts there, and having frequent occasions to examine the records, and I never found in any index or record anything with reference to any such lien.

Cross-Examination by Louis Palmer:

I resided in Pike county all my life until '92, except the period from '69 to '74 inclusive, when I was away in college and teaching. I knew in a general way that certain bonds had been issued, but had no definite knowledge except common report; knew of the construction of the levee; knew of the break in the levee in '76 and of the devastation that accompanied it. Took no part in the repair of the levee; knew Jones and Wheelock and had heard they were commissioners under the old levee law; first acquired land Sept. 8, '87; I was familiar with land titles in Pike county from about '80 until I left there in '92; knew of the present levee district; when I bought my land I know that the present district took possession of a large part of the old levee; but know that there are considerable sections of the new levee not on the same grounds as the old. I read the decision in the Updyke case, and heard of the decision of the Webster case, as I was at the time reading law in the office of Judge Atkinson, who was largely interested in levee lands. It was his opinion, and that of all the lawyers with whom I conversed, that the old organization was held entirely unconstitutional and its acts and bonds void.

Testimony of Thomas Worthington --Recalled

I bought my lands with the full knowledge of the proceed-
322 *a* ings referred to in my testimony and after these various conversations and discussions. I am one of the counsel in this case, and have been since perhaps '89. I entertained the opinion when I bought my lands that they were relieved by the decision of the Supreme Court from any lien on account of the old levee bonds. I knew my lands were in the levee district. As I stated in my former testimony I had many years ago heard that there was some kind of proceeding in the courts at Springfield against Wheelock and others; heard of it through Judge Atkinson and Mr. Jones sometime before I bought my lands. Sometime before my purchase I had a talk with Mr. Geo. W. Jones at Springfield and he simply said that there had been some sort of proceedings by Mr. Palms against the old commissioners some years before and that Palms had abandoned the case. I think he said that he had pretty straight information that Mr. Palms did not propose to spend any more money on it and considered the thing gone; I think this information came from Mr. Jones, and possibly from Judge Atkinson; this was some time before I purchased.

Witness makes statement in regard to his knowledge of the Skelsey, Fuller and Pierce contract.

I had no knowledge of a decree rendered in the Palms suit. The first knowledge I had of any such decree or order was when I read the present supplemental bill, probably in '89. My land was all purchased prior to that, in '87, but I subsequently obtained a quit-claim deed from Alma W. Kingsley to the land which I had previously bought from Mrs. Harvey as the executrix and residuary devisee of Shepard. I paid nothing for that quit-claim, and it was simply to satisfy some party about the title. I knew the Palms suit related in some way to the levee, but knew no details. Never
323 *a* heard of Mr. Jones being a commissioner since '76; never heard that the old commissioners had transferred the levee to the new organization. I don't think there was any office of the levee commissioners since shortly after the Webster decision; heard there had been some books of theirs left in the surveyor's office, but probably not until after I had heard that Mr. John Mayo Palmer had taken most of them away.

Testimony of E. M. Seeley

DR. E. M. SEELEY, examined by Harry Higbee, testified:

Witness produces deed from James S. Hyde to himself dated Nov. 1st, '86, conveying N. W. ¼ Sec. 32, Tp. 5-6, and east half S. E. 6, 6-6. Mr. Hyde was in possession of that quarter section some 8 or 10 years and of the other tract 3 or 4 years before my purchase; was in possession by himself or tenant, and I have been in possession since that time—possession was adverse to every to everybody. I have paid the taxes since and including '86, and they were paid regularly prior to that time, at least since '80 on the quarter section, and since '82 on the other tract, which latter tract has never been inclosed.

Cross-examination, by Louis Palmer:

Took no part in the original levee proceedings; owned no land at that time, but some tax titles. Knew little of the formation of the district in '80; have paid levee assessments since I owned this land in '86. Had heard something about litigation with reference to the Sny levee, a number of years ago. Think the suit against Wheelock was one of the first that was brought; knew there was a suit a great many years ago, but didn't pay any attention to it; don't know when the present suit was commenced.

Testimony of Wm. H. Gay. Recalled.

William H. Gay, recalled, examined by A. C. Matthews, testified:

Witness produces deed to N. W. ¼ Sec. 25, Tp. 6-6, from James G. Rupert and wife to witness, dated May 2, '74, consideration being $1,500, which was the amount paid, together with some $100 for back taxes making $1,600. It was unimproved.
324 *a* I took immediate possession, inclosed it with a fence, erected a house and barn, and have been in open, exclusive, adverse possession of same up to the present time, and have also paid all taxes on it each year from that time to the present, except the old levee taxes, which I understood were declared unconstitutional and void. Witness also produces deed to 16 acres of the S. W. ¼ Sec. 24, Tp. 6-6, lying south of the Sny, which he bought of B. H. Atkinson, executor, etc., on the 20th day of October, '83. I paid $96 for it. It was sold at tax sale in '83, and I have paid taxes on it since.

I bought the above quarter section while the old levee was in process of construction, relying upon the levee law which has since been declared unconstitutional. I made my purchase and my improvements, which cost more than the land, relying on the same law that the bond holders relied on in making their investment, and my loss is proportionately greater than theirs could be. The old levee that was created under that law was of no benefit to me, it was a trap, because relying on it and its provisions for maintaining the levee I lost very largely on my investments, improvements, crops and labor. I relied upon that law both for the construction and maintenance of the levee. I understood there was to be a good and substantial and protective levee built and maintained, otherwise I would not have made the investment. In my judgment the effect of the Webster case was to reduce the value of lands instead of enhancing it, and it was very destructive to values of lands, because the law provided for the construction and maintenance of the levee, and we were now deprived of any organization or means of maintaining the levee, and were left like a ship at sea without a rudder.

Testimony William H. --Recalled

After the break in '76 I engaged with others in doing vol-
325 *a* untary work and in getting up an organization of voluntary contributions to try to hold the levee from breaking, and after it broke in repairing it. I remember hearing Mr. George W. Jones asked if he would permit this work to be done, and he said he had nothing to do with it, that the law had deprived him of any control or authority in the matter. That was at our levee meeting at Hulls when he so expressed himself. Mr. Jones acted as an individual land owner at that time in making voluntary contributions and assisting in voluntary work.

Cross-examination, by Louis Palmer:

I understood the levee was to be constructed by the issuance of bonds, and that Skelsey, Fuller & Pierce had the contract for building it and were to take their pay in those bonds at ninety cents on the dollar. A partial levee was constructed. I have paid assessments on my lands, except those that were declared illegal. Don't remember that I ever paid any assessments under the old organization. I joined in the trust deed and in the formation of the present district. They took possession of a part of the old levee. We had paid for it pretty dearly, by the loss of our investments, to a great extent. I thought the men who had put their money into the undertaking would have to lose just as

Testimony of H. H. Gay.

we had to lose our investment, as we both relied on the same law. We didn't receive any money from those gentlemen in Detroit, or any value in anything I believe. We took possession of the so-called levee to protect our interests there. I think the bondholders should stand or fall by the same law we had to. We would have done better if we had not taken possession of the old levee, and had put our work on a sure foundation, because it was a trap and in many places not properly constructed and in a great many places where we had put our work upon it since it has given 326 *a* way underneath our new work. I had nothing to do with the levee until '76, when we did all in our power to prevent the levee from breaking by putting on some dirt and brush to keep it from sliding down and sloughing off from the seepage, and using sandbags and other means. I never understood the levee was completed, but think it was stopped because the bonds could not be sold.

Testimony of J. H. Dickason

J. H. Dickason, examined by Harry Higbee, testified:

I testified previously in this case. Witness introduces deeds from Edward Prince and wife to himself dated March 31, '80, conveying the S. W. ¼ Sec. 12, Tp. 4-8, with a warranty of a patent title. I have been in continuous possession of that tract from that time to the present and have paid all taxes on it. Witness introduces record of deed for 83 acres in S. W. of 18 Tp. 4-7, of which he has been in possession since May, '77, claiming exclusive title against the world and has paid all state and county taxes on it each year to the present time. Witness introduces deed from Elizabeth Wilton and others to himself dated Dec. 3, '84, conveying 83 acres off of the west side of the S. W. Sec. 18, Tp. 4-7. Mrs. Wilton got title in '75. I have paid all taxes and had continuous open possession since Dec. 3, '84, and was really in possession for my grantors for three or four years before that. Witness next introduces record of deed from Alexander Chandler dated Feb. 27, '85, conveying 20 acres in S. W. corner of the N. W. 18, 4-7, and has been in possession and paid all taxes since that time. Witness next introduces deed from Edward Prince for the undivided half of S. E. 19-4-7, also that part of the east half of the N. E. ¼ of said section which lies south of the Sny, dated ———, '78, and has had possession continuously and paid all taxes each year since that time.

Witness introduces numerous deeds conveying to him lands 327 *a* now owned by him, said deeds bearing date respectively

Sept. 8, '83, March 3, '90, June 18, '81, Apr. 4, '89, June 3, '88, Testimony J H Dicks
Sept. 22, '90, June 8, '81, March 31, '80, April 27, '80, July 22, '81, Feb. 27, '88, Oct. 23, '79, March 8, '87, Apr. 18, '85, Apr. 1, '91, Sept. 22, '85. Witness has had continuous open and adverse possession of all of the lands described in said deeds, and has paid all taxes assessed thereon, from their respective dates to the present time. As to many of those tracts the deeds to his grantors are introduced extending the chain of witness' title back to '80 or prior thereto. As to all of said tracts but one or two witness testifies to the possession thereof by his grantors and their payment of taxes thereon for several years prior to the date of said deeds to witness.

Cross-examination, by Louis Palmer:

I was previously examined in this case. I knew that bonds had been issued by the old levee district. Some of the deeds have levee assessment reservations and at least one mentions the bonds. I was a young man at that time and did not then own any lands in the district. Did not sign either of the first petitions; think I signed the trust deed, but don't think I signed the petition for the organization of the district in '80. The bill says I did.

S. E. Hewes, examined by Harry Higbee, testified: Testimony S. E. He

Witness resides at Quincy. Witness introduces quit-claim deed from Charles T. Hewes and wife, dated Nov. 25, '86, conveying west half N. E. Sec. 22 and S. E. of the N. W. of 22, Tp. 4-8, states that Charles T. Hewes derived titles from Robert A. Rouse; that witness and his grantors have had open and notorious possession of said premises, and have annually paid all taxes assessed thereon, from '80 to the present time. Witness introduces deed from Edward Seymour to Ideala Hewes, wife of witness; can't give date; conveying N. E. of 12, Tp. 4-8. Mrs.
328 *a* Hewes and her grantors have had continuous and open possession of said premises from at least the year '80 to the present time, and have paid all taxes thereon in each year at least from '80 to '89 inclusive. Witness had nothing to do with the proceedings for the formation of the levee district, and owned no land therein until he bought the Rouse land in '86. He had made a loan on this same land in '80, when an abstract of title was submitted to him which showed the land clear of all incumbrances. He had also made a loan on the land Feb. 14, '78. Witness knew nothing of the early litigation in regard to the levee or the bond issue.

Cross-examination:

mony of Hewes

I am one of the commissioners connected with the present drainage district appointed in '88. When I took my mortgage in '78 I resided in Payson, Adams county, which is about five miles north of the district. I understand there was an organization of the present district in '80; knew nothing of any organization prior to that time. Suppose I knew there was a levee when I acquired my mortgages and title. When I took the mortgage I had confidence in the man to whom the loan was made, and never expected to acquire title to the land; I merely examined the abstract; did not know that Mr. Rouse was interested in the original construction of the levee. Was not familiar with the original organization or construction of the levee. I was appointed commissioner by the judge of the county court under the organization of '80 to succeed Col. Prince. I understand we are working under the organization of '80, under a law passed probably in '79. I know George W. Jones and knew Mr. Wheelock; never heard of any suit pending against them until in '88; we talked about it after the break in '88 at a meeting held at Hulls; never heard of the decree of the United States Court that the old 329 *a* commissioners should retain possession of the levee until '88 or '89; don't know of any title we have to the levee except under the act of '79; only knew that we were acting under the general law; when I was appointed I found the levee under the control of the commissioners; supposed we were maintaining the levee of the Sny Island Levee Drainage District.

mony of Harder.

C. H. HARDER, examined by A. C .Matthews.

Witness owns no land in district, but is the representative of Miss Mary Ramsey, who acquired title to the S. W. quarter of Sec. 30 and N. W. of 31, Tp. 6-5, by the death of her father, H. R. Ramsey, in '73. Mrs. Jessie Long and Miss Ramsey were the only heirs of said H. R. Ramsey, and Mrs. Long conveyed to her all her interest in said land by deed, dated June 4, '74. She took immediate possession of this land at the date of this deed and has had continuous possession of it ever since and has paid all taxes each year on said premises, and has had continuous possession thereof up to the present time.

Cross-examination, by Louis Palmer:

Miss Ramsey has lived at Summer Hill, about 6 or 8 miles from the levee district, for many years, is about 65 years old, and witness does not know whether she signed the petition of '80 or not.

P. H. CASHMAN, examined by A. C. Matthews. Testimony of P.H. Cashman

Witness introduces a deed from Frederick Cartright and one from Carlton Smith conveying certain lands therein described, also deed from David P. Littler and others dated Aug. 20, '80, conveying certain lands therein described, and obtained a tax deed for the undivided half of the latter tract June 18, '83. The deed from Littler and others is a general warranty with the following reservations: "It is expressly agreed and understood, 330 *a* however, that the covenants herein shall not extend to or be construed to include taxes or special assessments for levee or drainage purposes of any kind or character heretofore assessed or hereafter to be assessed." Witness has been in the open, exclusive possession of each of said tracts of land, claiming exclusive title thereto, and has paid all taxes assessed thereon for each year from the date of said deeds respectively to the present time. I lived in Quincy before coming to New Canton. Witness also introduces deed for two lots in the town of Hulls.

Cross-examination.

When I bought my land I knew of the construction of the levee and understood the land had been assessed, but didn't know there was any debt for levee purposes laying over the land; I came to Hulls in '74; didn't inquire how the levee was to be paid for; I knew in buying my land the title was all clear; I knew Mr. Wheelock and heard that Mr. Jones had been a levee commissioner at one time; think I signed the petition of '80 for the organization of the present district, and have paid assessments on my lands from that time to the present; knew nothing about the payment for the levee.

DANIEL CAFFERY, examined by A. C. Matthews. Testimony of Daniel Caffery

Witness introduces deed dated ——, '61, for certain lands in Sec. 1, Tp. 5-7, therein described. Witness has resided on land and held exclusive possession and paid all taxes each year to the present time. Witness also introduces deed for certain lands dated June 6, '66, which is a part of the farm on which he resides; also deed from Andrew Shewe, Oct. 9, '65, conveying south half of north half of N. W. Sec. 15, Tp. 5-7, and has had possession of said land and paid all taxes regularly to the present time.

timony of
el Caffery.

333 *a* Cross-examination.

I knew of the formation of the levee district and paid some assessments to the old district. Don't think I signed any petition for the formation of the district or for the old assessments, and don't remember of signing the petition of '80; heard that bonds were issued. I was opposed to the enterprise, and I made more off my land before the levee than since, but paid because I thought it was cheaper to pay than to have a law suit. I have paid all but the last special tax.

timony of
Branham.

F. H. BRANHAM, by A. C. Matthews.

Witness has resided in Hannibal, Mo., since '57. Witness offers deeds from Granville Bookout, dated June 13, '74, and deed from Henry Seifert and wife, dated March 26, '91, conveying to witness the lands therein described, and has had possession of said land and paid all taxes from date of deeds to the present time. I was cultivating this land in '76. The levee was wholly insufficient. I was out on the levee with my men and a large number of citizens turned out to try to hold it. We succeeded in holding it at Sand Slough, but it broke in five places. I was along the levee during the time it was being built and noticed that it was done very poorly, stumps and timbers were buried in the levee. I remember two large stumps between Rouse's and the railroad, and probably three miles below a large timber was covered up in the levee. Above the bridge some quicksand and similar material was put into the levee. At Sand Slough we drove down stakes and filled sacks with sand and banked them up against the levee to hold it. I had great loss when the levee broke, and each time it broke. After the breaks it was hard to get a tenant to go on to the land and put it in.

Cross-examination, by Louis Palmer:

334 *a* I lived in Hannibal in '71 and knew Maj. Clark; didn't pay any attention to the bottom district until I purchased my land. I paid two levee assessments to the old district and knew the levee had been constructed, in part at least, by Skelsey, Fuller & Pierce. I knew the old commissioners, but had nothing to do with their selection or with the levee; I knew of the issue of bonds, but did not know that my lands were subject to assessments until after I bought; don't know whether I signed the petition of '80. The levee is a fairly good one now but we have to renew it. A levee gets better as it gets older, from settling. You have to renew the top and give it something to settle with.

WILLIAM T. BARTON, by A. C. Matthews.

Testimony of William T. Barton.

1641 to 1643, witness offers deed from Isaac Barton to himself, dated Dec. 16, '86, conveying N. E. Sec. 13, 6-6, and deed from one Denman to said Isaac Barton, dated in '73, for same lands. Witness states that he and his grantor have had continuous possession of said land and have paid all state and county taxes thereon from '73 to the present time, and produces tax receipts for same.

I have been frequently on parts of the levee, and knew of the breaks in '76, '80 and '88, and know that parts of the levee has always been very bad. Never saw any stumps in levee.

Cross-examination, by Louis Palmer:

I knew a levee was in process of construction and heard that bonds were to be issued when I bought my land; believe two assessments were paid before the bonds were declared to be illegal; don't think I signed the petition in '80 for the new drainage district; paid at least two of the old assessments; paid assessments to the new districts; am aware that a part of the same levee is being used as under the old district.

PHILLIP FUSSELMAN, by A. C. Matthews.

Testimony of Phillip Fusselman.

Witness introduces various deeds for land described therein, and states that he has had possession and paid all taxes since the date of deed. My brother used my team and did some work in 335 *a* the construction (222-3) of the levee, but I owned no land there at that time. I was along the levee several times during its construction, and I thought it was poorly constructed; there were too many logs and snags in it, and it wasn't high enough or strong enough. It wasn't half as big as the present levee. I saw logs go into the construction of the levee at Cincinnati. The log lay on top of the ground and they buried it up, when I was there. I didn't see that the base of the levee was grubbed or plowed out or any puddle ditch in the center of it. I think they had one furrow plowed on each side of the bottom of the levee.

Cross-examination, by Louis Palmer:

My brother was working for one of the contractors and didn't get any pay, and I don't know of any body getting paid. I heard some talk of bonds being issued.

Edward Caffery, recalled, states sales made.

J. H. MILBURN, by Harry Higbee.

Witness introduces deed from Francis Marion, dated April 14, '89, for certain lands therein described, being a general warranty deed with the following exception: "Except taxes for the construction of the Sny Levee." My grantor and myself have been in continuous possession of these lands since '79. Witness also introduces deed from Wm. P. Brown, dated Sept. 24, '91, and witness and his grantors have been in possession since at least '79, and has paid taxes since his purchase. Witness also introduces deed from Charles E. Dustin, dated Apr. 27, '79, also deed from the same party, dated Oct. 12, '86, for lands therein described, and possession of witness and his grantors has been continuous since at least '79.

I became familiar with the levee in '80 and knew of the break in that year. There were also breaks in '81 and '88, several 336 *a* each year. I know what is claimed to be the highwater mark of '51 and there has been no high water equal to that since I have known the levee. The levee was neither strong enough or high enough to protect the land from the water of the Mississippi river.

Cross-examination, by Louis Palmer:

The fall of '79 was the first I ever knew of the existence of the levee; I acquired my first land in '86. I had heard that the levee had been partly paid for and partly not paid. I never heard of any case pending in the U. S. court until in '88. I have acquired but one tract with knowledge of that suit; the others were all bought prior to that time but the deeds were not issued until the lands were paid for, at the times the deeds bear dates. I had heard that the bonds had not been paid. I had heard that in a suit in the Supreme Court in this case the law under which they were issued had been declared unconstitutional.

JOHN O. ROBERTS, by Harry Higbee.

I reside in Clarksville, Mo. Witness introduces deeds from Warren S. Kibbetts to himself, dated Feb. 17, '86, conveying S. E. Sec. 5, 8-4. My grantor had owned this land for 10 or 15 years, and he and I have held possession adverse to everyone continuously to the present time; I had paid all the taxes since my purchase, and I think they were regularly paid prior to that by my grantors.

Witness refers to deed to B. P. Clifford and himself for various tracts of land, the said Clifford being now deceased. Among these lands are south half of Sec. 4, Tp. 8-4, bought in '75, and the N. E. of the N. W. of 9-8-4, and part of the east half of the S. E. of 9, obtained at the same time. I owned one-third of the land and Mr. Clifford's estate two-thirds he died in the winter of '80 and '81. The land is undivided and I manage it and take care of it. Witness offers deeds from various parties to Wm. McIntosh, dated May 23, '86, April 2, '87, and other deeds describing lands therein conveyed. Said lands were subsequently conveyed by said McIntosh to witness and the estate of said Clifford, so that McIntosh owns one-half, said estate two-sixths and witness one-sixth. All the above lands have been in possession of myself and of the other owners as shown by said deeds and all taxes have been regularly paid thereon from the date of said deeds to the present time.

337 *a*

Cross-examination, by Louis Palmer:

I reside in Clarksville and knew of the construction of the levee; think I acquired my first land in '75, and paid one or two assessments thereon under the old organization. There was no litigation when I purchased my land, but I knew that bonds had been issued. I knew of the decision of the Webster case in '76 holding the law unconstitutional under which the district was formed, and paid no assessments after that decision; but paid two assessments in all I think. I bought the first tract of land with the understanding we would be given a protective levee and that it would be continually kept in repair, and I was anxious to have the levee kept up, believing it to be a good thing. If I had not relied on the maintenance of the levee I would have had nothing to do with it. A part of the new levee is on the same land as the old one, and a part of it is not; in many places the water washed

imony of O. Roberts

away the old levee and in rebuilding they put it on different ground. I don't think the old levee was ever completed; there was a small levee there. It did first rate on high ground when there was no water. During the high water of '76 before the levee broke we took a measurement and found that the water of 338 *a* '51 was more than three and a half feet above the top of the levee as then constructed. There was a mark preserved of the '51 water, which remains there to-day, and when the flood of '88 was running over the top of the levee it was not within three and a half feet of the water of '51. The water was about as high in '81, in '80 as it was in '88; also in '82. In '92 the water was a great deal higher than the top of the original levee. (Other witnesses explain how the levee was topped out and protected in that year.) When the levee broke above, it would flow from the inside out. I knew something of the old commissioners, but had no dealing with them. I don't know that they were agents of mine in any sense. When they were appointed I owned no land there. They quit work in the spring of '75. I am not sure whether it was before or after that I purchased my first land. I knew that bonds were issued, and my firm once owned a bond; don't know what has become of it; we have not considered it of sufficient value to be taken in our inventory.

imony of rge P. Long

GEORGE P. LONG, by Harry Higbee.

My father owned certain lands in the S. W. of 27 and S. E. of 28, Tp. 6-5, for many years, as long as I can remember; he died in '83, leaving Harry, William and myself as his only children. He left a will by which the land was devised to my mother for life or so long as she remained his widow. We have had continual possession of the land for many years and paid all taxes regularly.

Cross-examination:

My father's name was Kenedy Long: I don't know what part, if any, he took in the levee scheme.

Testimony John W. Boyd.

JOHN W. BOYD, by Harry Higbee.

339 *a*

Witness introduces deed from Benjamin C. Purcell to James R. Boyd and witness, conveying an undivided ¾ of the west half of the S. E. of 5-6, and south half of N. E. of 5-6; also deed from James R. Boyd to witness for the undivided ½ of same lands conveyed by above deed, dated Aug. 8, '73; also a deed from David Sellers and E. Williams to witness for certain lands therein described; deed from James R. Dutton and wife to witness, dated June 4, '87; deed from James W. Johnson and wife to witness; and tax deed from county clerk, dated June 10th, '78, for the lands described in said deeds respectively; also deed from Alvira Ross, executrix, to witness, dated July 31st, '82. Witness has had continuous adverse possession and has paid all taxes assessed on said lands since the date of said deed respectively. Mrs. Ross has been in possession of the last tract prior to my purchase She foreclosed a mortgage against one Purcell, who had been in possession since '68 or before; witness also offers records of certain other deeds.

Cross-examination, by Louis Palmer:

I first acquired lands in the district in '71; I knew two of the commissioners; knew of the construction of the levee, and paid assessments for two or three years; don't think I signed the petition to the county court, nor the petition of '80. I paid my first assessments with the understanding they were to build and protect a levee that would protect us from a '51 water and maintain it thereafter. We know places where the water of '51 reached, and the water has never come within three and a half feet of those marks, but it has broken the levee. I think the levee now has more than as much again dirt as the old one, and I think it is from four to six feet higher in places. My lands are also in the Boyd levee district to protect against Hadley Creek.

Testimony Daniel E. B

DANIEL E. BATES, by A. C. Matthews.

340 *a*

Witness introduces deed from Edward F. Binns to himself, dated Oct. 2, '84, being quit-claim deed without covenants, conveying the west half of Sec. 13, 5-7, and witness has sold all but 200 acres off of the west side of said section, and witness has had possession ever since. Witness introduces deed from the State of Illinois conveying certain lands in Sec. 16, dated —, '85,

timony of
iel E. Bates

and immediately took possession, and has continued in possession to the present time. This land has not been assessed for state and county taxes, as it belonged to the state.

Cross-examination.

I knew that levee bonds had been issued; heard of the present case when the marshal served summons on me; never paid any levee assessments.

timony of
T. Donahoe.

S. T. DONAHOE, by Harry Higbee.

I am a son of Phillip Donahoe, deceased, who died Aug. 29, '89. Witness produces deed from James D. Rupert and wife to Phillip Donahoe, dated Dec. 4, '75, conveying S. W. ¼ Sec. 25, Tp. 6-6. I know that my father went into possession of this land immediately after the date of said deed, and that he and his heirs have had continuous possession of said land, and have paid regularly all taxes assessed thereon from said date to the present time. My mother's name is Phila Donahoe, and the names of my father's children are: Mary, now the wife of J. H. Welch, Mrs. Edna Wyatt, Anna Donahoe and myself, who now own said premises. The land has been in cultivation ever since my father purchased it; has been inclosed by fence and has two houses on it. My father and ourselves have claimed ownership adverse to every one.

Cross-examination:

My father opposed the construction of the levee; he was at one time a member of the firm of J. D. Rupert & Co., and was
341-*a* associated with them at that time, but don't know in what capacity. That firm opposed the construction of the levee because they were the owners of a flour mill at Rockport, operated by water power from the Sny, and the construction of the levee would destroy their water power. They made a contract with the old levee district by which they were to be paid $20,000 to surrender their interest. They opposed the levee all the time, and tried to destroy it by getting an order from the Circuit Court of the United States to cut it. I know they received some sort of indemnity, but don't know from whom it was received, nor exactly what it was for, but a sort of indemnity for destroying their water power.

CHARLES G. PRICE, by Harry Higbee. Testimony Charles G.

Witness introduces deed from William C. Forman, trustee, to John B. Price, dated May 30, '79, conveying about 706 acres of land in Tp. 5-7 therein described. Witness is a son of said grantee, who died Jan. 31, '95, leaving a will by which he devised said lands to his widow, Susan M. Price, for life, and in fee to his four children, John D. Price, Jr., William A., Eugene H., Charles G., and Geo. H. Price. My father took immediate possession after the date of said deed, and he and his heirs have been in continuous, open and notorious possession, and have paid all taxes upon the premises to the present time, and witness produces his tax receipts for each year from '79 to '94 inclusive.

Cross-examination, by Louis Palmer:

The land is 10 or 12 miles from Hannibal, where my father resided since '57; I remember the construction of the levee; never heard how it was to be paid for until recently. I heard of the decision in the Webster case, but never heard of the present suit until last Friday, and don't know whether my father was ever served with process in the case.

342 *a* A. G. HAMLIN, by Harry Higbee. Testimony A. G. Ha

Witness resides in Hannibal, Mo., and introduces deed from the Northwestern Lumber Co. to Wm. H. Miller, Albert G. Hamlin and Isaac Newton, dated June 1st, '77, being a general warranty deed without reservation conveying the premises therein described. Mr. Newton is dead and Mr. Miller and I now own the land. We went into possession immediately after the date of this deed and have had open possession, adverse to everyone, and have paid all taxes regularly each year on said land from the date of said deed to the present time. Witness had no interest in the levee district prior to the date of said deed and was little acquainted with it. At the time of our purchase I knew of the decision in the Webster case and that was one thing which induced us to buy, and that there was nothing on the land; that the old bonds were not a lien against it. We discussed the matter to some extent.

ony of
B. Elliott.

W. B. ELLIOTT, by Harry Higbee.

Witness resides in Hannibal, Mo., was not interested in the levee district at the time of its formation; introduces deed from Joseph Elliott to himself dated Aug. 20, '83, being quit-claim deed without special provisions, conveying certain lands therein described. Said Joseph Elliott had owned both lands for at least 20 years prior to his conveyance to me, and he had possession of it for about that period before he sold it to me. I have had open, adverse possession since my purchase in '83 and have paid all, including levee assessments, taxes on it each year, and Joseph Elliott paid them as long as he owned it. Witness also introduces deed from Joseph Elliott to himself and other parties dated Sept. 25, '90, conveying the premises therein described, being a general warranty deed with the following reservation: "Excepting, however, from each and every of the foregoing covenants, any
343 *a* liens or lien created thereon by the issuing of any bond or bonds for the purpose of raising money for levee, draining or ditching purposes, and also any lien or liens thereon for any assessment for levee, drainage or ditching purposes, or any special tax or assessment for any levee, drainage or ditching purposes, or any judgment for or on any such bond, special taxes or assessments." Joseph Elliott had been in possession of these premises for about 30 years, and I myself cultivated it under him for about 18 years. The taxes were paid continuously for at least 16 years. Our possession has been continuous for at least a period of 30 years.

I lived in Missouri when the levee was built and first became connected with the district in '74. I owned one levee bond of the face value of $500, and the first interest coupon was paid and torn off. Witness introduces the bond. We knew of the decision in the Webster case and understood the bond would be thereafter of no value, that the court had declared the original district, the law under which it was formed, unconstitutional. That was the general understanding among people who owned lands and dealt in lands in that district. They thought the bonds would thereafter would be no lien on the land and it was sold and traded with that understanding.

Cross-examination, by Louis Palmer:

I am 64 years old and a son of Joseph Elliott who left the following children: Jane Spencer, Joseph B. Elliott, Elizabeth A. Allander, James S. Elliott, Margaret S. Kay and Sarah E.

Whitcomb, also Charles E. Elliott, Abraham L. Elliott and Abbie Elliott, grandchildren, being children of a deceased brother of mine. Testimony W. B. Hill

344 *a* I never owned any land until after the levee was built. The bond produced here was given to me by my brother about three years ago. I knew the bonds were in existence when I bought my land. I think my father signed the trust deed, don't think I did, but am not positive, and don't know whether I signed the petition of '80 for the present district. I think my father used the coupon taken from this levee bond in paying his assessment.

A. G. HAMLIN, by Thos. Worthington. Testimony A. G. Ham

Witness introduces deed from William A. Davis to the Hannibal Planing Mill Co. dated Aug. 3, '92, conveying N. E. Sec. 9, 4-8. Said Co. is a corporation and all the stock is owned by W. H. Miller and myself, except one share which I gave to my sister, Mary A. Buckman. Witness introduces deed from Arthur M. Davis and William M. Davis to Wm. A. Davis dated Jan. 10, '81, for west half N. E. 9-4-8; also deed from guardian of Mary Cornish to William A. Davis for east half of same premises dated Feb. 18, '80, (these deeds being prior in chain of title to certain deeds heretofore introduced). Said parties had possession of said lands from the date of their deeds until they sold to us, and paid all taxes each year thereon. The tax receipts were furnished to us for the period while they owned it and we have paid the taxes since.

Cross-examination, by Louis Palmer:

I knew of the construction of the levee but that was about all. Was then engaged in the planing mill and lumber business in Hannibal; knew the levee lands had been subject to levee assessments, but understood they had been cleared up by the decision in the Webster case. I knew my lands were in the levee district but knew nothing about assessments. Understood that whatever was done to the levee from that time on the land had to pay

345 *a* for. I learned from the records that Henry Morris once owned some of these lands which we now hold. When I bought my lands I knew the bonds were in existence, that the parties who owned them had tried to collect them, and it was said the courts had decided they could not be collected—that was the reason we bought. I never heard of Judge Drumond's decree with reference to those bonds. We signed the trust deeds, for the purpose of protecting our lands. The former organization had ceased doing any work and there was no way of getting any money, and so a certain number of us signed the trust deed.

ny of
alloway

A. L. GALLOWAY, by A. C. Matthews.

I reside at Pleasant Hill near the levee district. I have always been opposed to the levee and my neighbors generally have been, especially those whose lands are within the backwater limits. I testified previously in this case. Witness offers deed from Master in Chancery of Calhoun Co. dated Oct. 16, '83, made under decree for partition sale of lands belonging to the estate of Smith Gennings, conveying 220 acres therein described. I bought the land with a crop on it for $2,500, and considered that a good price. Took immediate possession after my purchase and have continued said possession and paid all taxes to the present time. Witness next offers deed from Zepheniah Webster dated Dec. 6, '86, conveying to witness the S. E. ¼ Sec. 18, Tp. 7-4. Said grantor was the party in the Webster case involving the validity of the levee assessments, etc. A part of this land is not now in the present drainage district. I paid $2,800 for it, considering that a good price. Decision was rendered before I bought my lands. Mr. Webster was a neighbor of mine and our understanding by the decision in this case was that the assessments or taxes for building the old levee were declared unconstitutional and null and void.

Witness also introduces deed from Henry Wells for certain 346 *a* lands; also deed from William McLean dated Oct. 31, '85, for certain lands, being 18 acres for which he paid $333, a very high price because it joined witness' land. None of this land was under water in '51, which is the highest water we have ever known, but I have paid the levee taxes and all other taxes. A portion of the land bought by Harry Wells has been stricken out of the district by order of the court, because not subject to overflow. I owned no land until after the Webster decision, and then purchased supposing I would not be bothered with any levee assessments; made all of my purchases on the bottom because of that decision, and would not otherwise have purchased, supposing I would not have any levee taxes to pay, that they were stopped. I knew from the location of my lands that the levee could not possibly benefit me.

Cross-examination, by Louis Palmer:

I heard of the decision in the Webster case, but could not have given the date except that it was in the seventies. I have heard of the present suit by virtue of being summoned as a defendant; don't know whether my last tract, the Wells land, was purchased before the summons, but believe I was served after-

wards. I opposed the construction of the Sny levee and never took any part in the organization of the district; knew they were building a levee, by bonds; knew Jones and Westlake; never heard of the decree of Judge Treat that these assessments were to be a lien on the land; never joined in any trust deed and took no part in the formation of the present district; I have paid every assessment levied upon me to the present district; don't know that my grantors paid any assessments. I knew there was bonds issued and that work on the levee was done. I know very little about the levee, have been on but little of it, but have been informed that the present levee is in part built upon the same line as the old levee and a part is not. I have fought the levee all
347 *a* the way through; I made speeches all over the country against the levee; I never thought, owing to the peculiar situation of the country down there, a levee could benefit it, and I find it has been verified; it doesn't do it. I pay my present levee assessments to avoid a law suit; to buy my peace, but never filed any protest.

Testimony A. L. Gall

A. J. LOVELL, by A. C. Matthews.

Testimony A. J. Lo

Witness introduces deed from William H. Crow, dated Sept. 15, '87, conveying N. W. ¼ of the N. E. ¼ Sec. 12, 7-5; also deed from C. H. Harder and wife to said Crow. All taxes have been regularly paid from '77 to '94 and I have the receipts, and I and my grantors have had continuous possession of the land; also deed from S. S. Thomas to witness, dated Aug. 30, '73, for certain lands therein described purchased by witness from said Thomas and one Samuel R. Cannon from A. Mosier; also deed from said Mosier to said parties dated Feb. 22, '71, conveying same land; also deed from Samuel R. Cannon dated June 7, '71, to witness and said Thomas. We took immediate possession of said lands and have continued in possession and paid all taxes to the present time; witness offers deed from master in chancery of Pike county dated Nov. 9, '87, conveying 110 acres off of the west side of the N. E. of 32, Tp. 7-4. I have had possession and paid all taxes since that time, and in fact had a mortgage on it, and paid the taxes since '77. Witness also has deeds for certain lands bought by himself and Mr. Galloway in '87 of Thos. Worthington as assignee of Jesse Long. I lived in Pleasant Hill and knew Zephenia Webster, and knew that he had a suit involving the question of the validity of certain levee bonds. I knew of the result of that suit and that it was adverse to the collection of the bonds. Some of my lands were bought before and some after

mony of Lovell.

that time. I regarded the decision as relieving the lands from
348 *a* the lien of those bonds, and I purchased land with that understanding, which I would not otherwise have bought. Everybody in that neighborhood except me went into a company to test the law at Springfield, and Webster's name was at the head of it, and they all knew the result of it. After that it was understood down there that these bonds were of no value, and the lands were bought and sold on that idea.

Cross-examination, by Louis Palmer:

I knew the levee bonds were issued, but never owned any of them. I paid levee assessments; did not join in the trust deed nor in the petition for the formation of the present district; am paying assessments to the present district; I signed none of Maj. Clark's petitions, though I knew he was trying to get signers. I knew they were trying to get legislation about a levee. The land owners in our neighborhood thought that by the decision in the Webster case they had got out of paying for the levee. I knew there had been some litigation pending about these lands. The people in our neighborhood always contended that the levee was a detriment in place of a benefit, and they have been contesting the levee ever since, and that is my opinion to some extent. The Webster suit was got up by contributions from the people to test the question, and they are still testing it in that end of the district. They have a suit now in the Supreme Court to test the question of assessments. I did not personally protest against the building of the levee, and paid my assessments when I had to. Myself and others are contesting assessments now in the Supreme Court against the new commissioners. Paid my old assessments. Filed no protest.

mony of les W. Reed.

CHARLES W. REED, by Thos. Worthington.

Witness resides in levee district in Tp. 4 south, 7 west; he offers quit-claim deed from Mary Chandler and husband dated
349 *a* March 2, '86, conveying certain lands therein described. Deed from Charles F. Buchanan to John G. Wheelock dated July 21, '87, conveying said land as above, and deed from Wheelock and wife to witness dated Sept. 30, '87, conveying same land; also deed from John R. Reed and wife to witness, dated Sept. 30, '87, conveying certain lands in said township; also deed from Maria A. Gard to Daniel Lively dated Feb 8, '76, conveying N. E. ¼ Sec. 18 Tp. 4-7; deed from said Lively to John W. Gay and Wm. H.

Oney dated Oct. 8, '83, conveying part of same land; deed from said Oney to R. W. Gay dated Feb. 21, '84, conveying same land; deed from said Gay to Hugh V. Sheevers dated Feb. 14, '85, conveying same lands as above; and deed from said Sheevers and wife to witness dated Jan. 19, '87, conveying same land.

I and those through whom I have derived title have had continuous possession of said lands for at least 7 or 8 years; I have resided in the center of them all the time, and all taxes were regularly paid on said lands for at least the same period. Before I bought these lands I heard talk of a suit that was decided against the bonds, but I was a very young man then and know but little about it. When I bought these lands I did not understand that there was any incumbrance on them to pay the bonds, and I always heard they were of no value; they were beaten in the Supreme Court.

Cross-Examination by Louis Palmer.

I am the son of John R. Reed, and obtained five or six acres of my land from him through a trade, and obtained part of my land through Daniel Lively, who is dead. I knew nothing about the formation of the district, and did not know any bonds had been issued until lately, probably six or eight years. Can 350*a* remember when the levee was built, when I was a small boy, but never heard how it was to be paid for; paid my assessment for 10 or 12 years; it was in late years that I heard about the bonds; I didn't know but the levee had been paid for; never made inquiry; do know as a matter of fact that present levee was practically the same levee; I worked on the present levee; have paid assessments right along since I bought; don't think William Nees, who was an uncle of mine, ever owned any of my land. I never heard of any case in the United States Court at the time I bought those lands. I just heard the bonds were beat, and that is about all I ever heard about it. I think some of the lands are not benefited, and my father and I have been fighting it right straight through; our lands are comparatively high and we raised crops on them before the levee was built, and some of my lands were valued as high or higher before the levee was built as it is now. I don't think the levee has been a benefit to the district just where we live. I paid some of my assessments after a hard fight, and beat some of them in the courts.

Testimony of Chas. W. Reed.

I have heard that my lands had been submerged in '51, but it has not been submerged since. I have another independent levee. The shutting up of the Sny at its head stopped the current and it filled up, and the creek has filled up, and we have leveed it, and yet it overflows our land, and it took my wheat this year while in the shock.

Testimony of William Tanner.

WILLIAM TANNER, By Thos. Worthington.

My wife is a daughter of William Chandler, deceased, and her name is Susan Ann Tanner. Witness introduces deed from William Chandler to Susan Ann Tanner dated Nov. 25, '93, conveying 100 acres of land in Tp. 4-7; also deed from J. S. Irwin dated Dec. 3, '79, and deed from J. B. Wheelock dated May 8, '76, both to said William Chandler, and conveying same land as above. Have known William Chandler for about 23 years and know that he was in possession of this land, resided on it up 351 *a* to the time of his death. My wife has paid taxes since the date of her deed, and am satisfied William Chandler paid taxes regularly at least since '80.

Cross-Examination, by Louis Palmer.

I have been talking about William W. Chandler. I knew little about the levee until I was married. I own no lands in the district myself; neither my wife or myself have been served with summons in this case. I heard about this case when my wife got her deed.

Testimony of Jos. J. Stolte.

JOSEPH J. STOLTE, by Thos. Worthington.

I live in Levee township near the river. Witness offers deed from Granville Bookout to himself dated March 8, '75, and deed from James M. Fry to himself dated March 27, '75, conveying certain lands therein described in Tp. 4-8. I took possession of said lands immediately thereafter and have lived on them and have had exclusive possession, and have paid all taxes on them to the present time, and have paid over $700 in levee taxes. I heard of the decision that the old bonds were illegal and that nobody was paying assessments on them.

Objected to by complainant. Motion to strike out.

Cross-Examination, by Louis Palmer.

Think I signed the trust deed, and perhaps the petition of '80. The parties from whom I bought paid the levee tax in '75.

MATHEW R. ABRAM, by Thos. Worthington.

Testimony Mathew R. Ab

Witness offered deed from Mary A. Ricks and Alice Riggs dated Oct. 7, '73, conveying N. W. Sec. 6, 7-5, being a warranty deed with the following special clause: "Said Mathew Abram to pay all taxes accruing in the year '73." I took immediate possession and built a house on it in '75 and have lived there ever since
352 *a* except when the water ran me out and have paid taxes every year date of my deed and have receipts. The high water of '76 took away my fence and everything else, and I had to go away for a time to make my living. I knew Mr. Webster and many others who were interested in the Webster case, and heard of the decision of the Supreme Court and understood it beat the bonds. That decision was a matter of general conversation in our neighborhood and since that time I have not recognized them and supposed they were done and gone.

Cross-Examination, by Louis Palmer.

I paid two assessments to the old commissioners and knew about the construction of the levee; don't think I signed the petition of '80. The present levee has possession of the biggest portion of the old levee, but are running around it in places. The old levee was worth nothing in the start. Witness states his opinion of the old levee at length, "I staid with it and came pretty near starving to death.

MRS. E. H. TALBOT, by A. C. Mathews.

Testimony Mrs. E. H. Ta

Witness resides in levee district and offers deed from Horace Horton to herself dated Feb. 19, '77, conveying N. E. of Sec. 11, 06; also deed from same party to herself in '77 conveying south half S. E. Sec. 2, 6-6. I took possession immediately after date of deed and have a house, etc., on it and have lived on it for about 15 years, and have paid taxes each year. I now only own 20 out of the 80 acres. I mortgaged the land for money borrowed to pay assessments and lost it after the levee broke; the mortgage was foreclosed and I bought back 20 acres, receiving a deed dated July 13, '88.

Cross-Examination, by Louis Palmer.

I knew of the construction of the levee, but did not know how it was to be paid for at the time I got my deed, but paid my assessment since I got my deed in 1888. I heard about the
353 *a* issuance of bonds but paid little attention to it, and didn't know whether they had been paid or not when I got the land; didn't suppose I would have to pay any levee bonds. I never paid any assessments to the old levee district but have paid to the new organization.

timony of
W.
Brammel.

JOHN W. BRAMMEL, by A. C. Matthews.

I reside in Pleasant Vale Tp. on Sec. 20, 5-6. Witness offers deed from Thomas J. Brammel and wife to witness dated Mar. 20, '69, conveying N. E. of N. W. Sec. 20, 5-6, deed from Hiram R. Smith to witness dated Jan. 15, '66, conveying N. E. of N. E. Sec. 20, 6-6, also own west half N. E. 20, bought in '66; have had possession and resided on the said lands ever since the date of said deed, claiming it against the world, and my deeds have been on record and have paid my taxes every year to the present time. I have previously testified in this case. Also own 54 acres described by witness of which witness has had possession and has paid taxes on for many years.

Cross-Examination, by Louis Palmer.

Witness introduces a deed dated Oct. 15, '86, from Hiram Smith to correct a mistake in his deed of 1866, wherein he conveyed to John H. instead of John W. Brammel. I knew of the establishing of the district and issuing of bonds and think I signed the trust deed.

timony of
hard H.
Baker.

RICHARD H. BAKER, by Thomas Worthington.

I live near the upper part of the levee district. Witness offered deed from Daniel Lively to himself dated Jan. 6, '83, conveying certain lands therein described, being a general warranty deed with the following reservation: "Except levee assessments." I have had open and exclusive possession of these lands since that date and have continuously paid all taxes. When I bought 354 *a* my land I had heard there had been some bonds issued and sold, but I heard there had been a trial in regard to it and that they were never to be paid. That was the general understanding in our neighborhood and I bought them with that view.

Cross-Examination, by Louis Palmer.

My grantor would not warrant against them, and I understood they had been issued, and purchased my lands with knowledge of possibility that they might be paid. I knew of the trust deed, can't say whether I signed the petition for the present district; have lived near there since '67.

JOHN F. GUNSETH, by Thos. Worthington. Testimony John F. Guns

I am a son of Phillip Gunseth, who has been dead about 30 years, leaving the following children: Catharine, George, John F., Maria, H. E. and John Henry. My father died intestate and all his children died intestate, and all without issues excepting one, Catharine. We inherited 31 acres in the levee district in S. E. of N. E. Sec. 20, 3-8, and have lived on it continuously and paid all taxes from then to the present time. Witness offers deed from his sister Catharine dated Oct. 18, '86, conveying her interest in the above land. I was ten years old when the levee was built, and the oldest of my family was about six years older than I. We had nothing to do with the construction of the levee.

Cross-Examination, by Louis Palmer.

I lived on the land about 30 years, and became of age in '83. We have paid levee assessments on this land, but don't know whether assessments were paid under the old organization. Since '80 I have known that these lands were in the levee district, but prior to that my mother attended to the business; I have been attending to it since that time for my brothers and sisters and myself. When I got this deed from my sister I knew there was a levee there. I didn't know the land was liable for levee pur-
355 *a* poses; knew there were assessments to keep up the levee. I heard something about old levee bonds, but I thought they had been done away with until a few years ago. The assessments I know about are those made by the present commissioners.

CYRUS STEWARD, by Thos. Worthington. Testimony Cyrus Stew

Witness offers deed from Southard & Waller dated March 25, '80, conveying S. E. of 30, 4-7, being general warranty deed "except against the lien and deed of trust given to secure the payment of taxes for levee purposes and against any taxes for levee purposes." I immediately took possession and have had continuous, open possession since date of deed, and paid all taxes regularly. Built a house in '80 and have lived on it since that time. When I bought the land I understood there were some old levee assessments for bonds and that the law under which they were issued had been declared illegal, and they would never have to be paid; had that understanding when I bought my land. I lost my crops when the levee broke in '80, '81 and '88. I first heard about the present suit at a meeting at Hulls in '80 or '81.

Testimony of [illegible] Steward. Cross-Examination.

The parties I bought from where merchants in Hannibal. Several land owners told me that these bonds were illegal, the law under which they were issued; didn't know just how the levee was built. Never heard of the decree of Judges Treat and Drummond of '80; knew of the deed of trust, and understood it was entered into to repair the breaking of the levee; don't know what the other provisions in my deed related to. I didn't understand there was anything to be paid on the bonds. I paid $2,400 for my land, and would not have paid that for the land if I had understood there were levee assessments against it.

Testimony of John W. Smith 356 *a* JOHN W. SMITH, by Thos. Worthington.

Witness offers deed of John Murry and wife dated Oct. 2, '72, conveying certain lands; also deed from John Morris and wife dated Feb. 8, '72; has lived on lands continuously from that date to the present; heard of the decision in the Webster case, that the bonds were unconstitutional. (Objected to by complainant on grounds that title deeds show that title was acquired prior to decision referred to.) It was generally known in the neighborhood, and from that time has held possession of his land adverse to all the world, and has paid all taxes thereon continuously to the present time. First heard of the present suit in '88 or '89.

Cross-Examination, by Louis Palmer.

Paid first two or three levee assessments, and knew of issue of bonds, and that they were a lien on the land at the time issued.

Testimony of Saloman Shewe. SOLOMAN SHEWE, by A. C. Matthews.

Witness offers deed from master in chancery of Pike county, dated Jan. 27, '72, and another deed from same party for other lands dated Dec. 7, '82. Only a small part of the land subject to levee assessments; also own land bought in '64; took possession of these lands immediately after the date of deed and have had possession ever since, and they were in possession of my grantors prior to my purchase. I paid $5,500 for 60 acres of this land before the levee was built. I opposed the building of the levee all the time, and a majority of the land owners along the border of the district opposed it; they thought it would be detrimental to them

in place of a benefit. It has been a damage to me. It has caused the Sny to fill up, turning the water off, and has filled up the creek, and has caused us to levee to keep the creeks off our farms, and those two farms cost me five dollars an acre to keep the creek off.

357 *a* Building the levee across the head of the Sny caused it to fill up and that caused the creek to fill. Nothing the matter with the levee except that it wasn't big enough or high enough nor broad enough to turn the water.

Cross-Examination, by Louis Palmer.

Knew of the issuance of bonds and paid assessments for '72, '73, '74 and '75, but after the law was decided unconstitutional I didn't think there was anything against the land. Didn't sign the trust deed and took no part in the formation of the present district. When I bought land in '82 I didn't think it was subject to levee assessments, for I thought the bonds were null and void. Don't know the year of the decision in regard to the bonds; knew of the fact that the levee was being constructed.

FRED EPKER, by Col. Matthews

Witness introduces deed from Philo Thompson to himself dated Aug. 1st, '88, conveying certain lands, and states that Thompson owned the land in '81, and he and I have had continuous possession since '81, and have paid taxes from that time. I now own about 110 acres of the land and sold the balance to a Mr. Baker. I took no part in the construction of the levee, signed no petition, and did not sign the trust deed. That was the first land I owned in the district, and I paid a fair cash value for it.

Cross-Examination, by Louis Palmer.

Knew land was in the drainage district and Sny district when I bought it; knew levee was constructed in '72 and heard bonds had been issued for it. When I bought my lands my grantor said the bonds were done away with; didn't know whether the levee had been paid for or not.

timony of J. Edmonds

O. J. EDMONDS, by A. C. Matthews.

I live in Missouri and owned lands in the levee district.
358 *a* Bought my first lands, 1,100 to 1,200 acres, in '87, and had deeds here, taking a quit-claim deed. Commenced cultivating lands immediately after I purchased. When I purchased my lands I had the title examined by Mr. Crawford, a practicing lawyer, then in partnership with Judge Orr. I told Mr. Orr I was thinking of buying lands in the levee district and had heard there was some sort of claim against the land. Mr. Orr told me that the Supreme Court itself had decided against all those liabilities, and advised me that I was safe in buying the land, and I purchased it, and paid more than any one else would pay, acting on that assurance that the courts had held that those bonds were not collectable. Personally I had no knowledge of the matter.

Cross-Examination, by Louis Palmer.

Mr. Orr was then a practicing attorney of ability, and said he would guarantee me that I would not have to pay anything on the bonds; did not do this in writing, and is now judge of the Circuit Court, and he gave me that opinion in '87. I knew nothing of any decree against the lands in the U. S. Circuit Court, nor of any suit of Francis Palms against the levee commissioners. I have purchased some lands since '89, when the supplemental suit had begun.

timony of P. Priestly

GEORGE P. PRIESTLY, by A. C. Matthews.

Offers deed from master in chancery Pike county dated Nov. 17, '84, conveying certain lands; also deed from Isaac Barton and wife dated May 20, '87, conveying other lands. Have been in possession ever since and paid all taxes. I knew nothing personally of the construction of the levee. Understood from the talk and reading that there had been a bond suit, and the law under which they were issued had been declared unconstitutional, and I would never have bought except with that understanding.

Cross-Examination, by Louis Palmer.

Think the decision was by Judge Drummond or Judge Treat.
359 *a* I have taken the "Old Flag" and the Pike County Democrat off and on, when I got there, I heard that they had issued bonds when I purchased.

MARY E. SAPP, by A. C. Matthews.

Testimony Mary E. S

I am the widow of John E. Sapp, who died Jan. 17, '85, and we have lived on the bottoms since '61, and have been cultivating it since that time, more or less. The land was bought in '66, '72 and '80; we had leased a part of it before we bought it. Witness introduces deed from Margaret Davis to John E. Sapp conveying certain lands. Also deed from J. K. Adams to John E. Sapp dated Oct. 21, '72; also deed from John A. Bell and wife to John E. Sapp dated Jan. 20, '80, and deed from James S. Irwin and wife to said Sapp dated March 21, '75; also deed from Sarah Sapp dated August, '66, and deed from Eugene Edmiston dated Feb. 23, '75, each conveying certain lands. We have had possession of all these lands since the date of these deeds and have paid all taxes to the present time. We cultivated a part of this land before the levee was built, and we made a better living then than at present. My husband was never much for the levee and didn't do much for it. Think I paid one or two assessments. The levee was too weak and too low to resist the water; we raised good crops, and plenty of them, before it was built.

Cross-Examination, by Louis Palmer.

I have only nine children living (names of children given), who with myself were my husband's heirs. We knew of the construction of the levee. Don't know that my husband took any part in the formation of the levee district. Think he paid old assessment as he was prompt about such things. The levee was of no protection to us because it frequently broke. Our lands overflowed before the levee was built. Heard of issuance of bonds.

O. J. EDMONDS, Recalled, by A. C. Matthews.

Testimony O. J. Edm —Recalled

360 *a*

Witness offers record of deeds mentioned in his previous testimony. Also record of other deeds mentioned. Deed from Dustin contains following reservation: "Bond for the construction of the original Sny Levee excepted from the warranty with a like reservation in another deed from Dustin. Deed from G. W. Shaw to witness dated Dec. 19, '87, is a warranty deed with the following reservations: "Taxes for the construction of the levee excepted." When he spoke of putting in that reservation it made no difference to me, as I was buying under the advice of my attorney that they were entirely harmless.

Testimony of J. J. Edmonds —Recalled.

Cross-Examination, by Louis Palmer.

Mr. Crawford and Mr. James Irwin gave me the same advice in this matter as Mr. Orr.

Testimony of Mrs. Henrietta Smith.

MRS. HENRIETTA SMITH, by A. C. Matthews.

Witness offers deed from George Peabody of London, England, dated Oct. '66, conveying certain lands to Sarah Sapp, the mother of witness, and deed from said grantee to Harris M. Smith dated Apr. 5, '75. He was my husband and died Aug. 7, '84. Immediately after the date of the deed in '75 we took possession of the land, and said possession continued in my husband and his heirs from that time to the present and all taxes regularly paid. We raised crops before the levee was built and got along pretty well. Whenever the water was high the old levee broke and didn't protect us; but two years ago the water was pretty high and it did protect. Don't think my husband took any part in the old levee organization. Witness offers certain deeds to herself dated Mar. 5, '83.

Cross-Examination, by Louis Palmer.

Have lived in the district ever since the levee was built and before. Sometimes the lands have overflowed, but for years they have not. We have lived on the land since '66 when my mother bought it for us but didn't get a deed from her until '75. I heard there was bonds but heard they were illegal. I pay the levee taxes regularly. I didn't sign the petition for the district, but probably paid assessments, didn't sign trust deed; it was common talk 361 *a* in the neighborhood that the bonds had been declared illegal.

The landowners have built all the levee we have there. The old levee was a curse to the people that settled on the bottom.

CHARLES H. RANKIN.

I live near the levee district, within two miles, and have owned land in the district since '79. I am a notary public and a justice of the peace in that neighborhood and am generally acquainted with the landowners in the upper part of the district and have been for many years. I have to some extent acted as business agent for many of them. They are mostly German, small farmers with little education—in Fall Creek Township. I appear here as agent for a number of them and have their deeds and tax receipts. Witness produces deed from Albert Beebe to Frederick Kiser dated Oct. 26, '78, conveying certain lands and tax receipts showing continuous payment of taxes from and including '80 to the present time. I know that Mr. Kiser has lived on this land and had exclusive possession since '78.

Mr. Palmer: Complainants object to the testimony of the witness as not being within the stipulation heretofore agreed upon by counsel and for the reason that the testimony offered is incompetent; this objection to go to all his testimony except that which concerns his own property.

Witness offers deed from Christoph Feil to John E. Adams, dated May 23, '73, and deed from Henry Alvay to said Adams, dated Nov. 29, '79. Also tax receipts on lands therein described from and including '80 to the present time, and witness states that said Adams has had open and exclusive possession of said lands from the date of the said deed to the present time. Witness offers deed from John E. Wright to George Frederick Speckhart and others dated Apr. 20, '80, conveying certain lands therein described; also tax receipts showing payment of taxes by the grantees in said deed from '80 to the present time. (Objection by Mr. Palmer on the ground that he cannot cross-examine the owners of these lands.)

Witness offers deed from Francis L. Capp and husband 362 *a* dated Dec. 7, '80, conveying certain lands; also plat of the partition of the land of Robert Rankin's estate under decree of the Circuit Court of Adams Co., Ill., wherein the lands described as No. 5, of said division, being the N. E. of Sec. 15, Tp. 4-8, were assigned to witness in said partition. I have been in the open, notorious possession of said lands since the date of said deed and decree in partition, and have paid all taxes regularly each year to the present time. At the time I obtained title to said land I

had heard of the decision of the Supreme Court that the bonds, or the law under which they were made, was unconstitutional. That was a matter of importance to the land owners in that neighborhood and it was generally discussed, and the substance or effect of this decision was generally known in that neighborhood. When I obtained title to my lands I did not consider they were subject to any lien for the payment of levee bonds, but were freed by the decision of the court.

Cross-Examination.

My father died Dec. 12, '78. Think I heard my father say that he subscribed to the Mississippi Levee and Drainage Comp'y; knew he was favorable to the levee. I knew bonds had been issued; I never heard of Judge Drumond's decision in '80. The first knowledge I had of the Palms suit in the U. S. Court was in May or June, '89, the same summer that summons was served on me in this case. I heard no discussion of this question among my neighbors until '89. I took no part in the organization of the present district, but have paid my assessments under the present organization.

CYRUS W. MACKEY, by Thos. Worthington.

Witness offers warranty deed from James L. Mackey and wife to witness with the following exception to the warranty:
"Except against any and all taxes or assessments and pro-
363 *a* vided that he shall not be liable for more that the purchase money above stated." I took immediate possession after date of deed and continued that possession and paid all taxes from at least '80 to '90. At the time of my purchase in '80 I knew nothing about any claim for levee bonds or levee assessments against the land. I was a young man under 21 years old and had never been in business. Had not heard of any proceedings in the U. S. Circuit court by Palms against Wheelock and others.

Cross-Examination, by Louis Palmer.

I was green when I bought the land from my brother, and didn't know what the reservation in my deed applied to. I knew there were assessments under the present organization.

Testimony of Franklin Tittsworth.

FRANKLIN TITTSWORTH, by Thos. Worthington.

Witness offers deed from Melvina Ross, executrix, dated Nov. 28, '79, for certain land. I have had possession of that land continuously and paid all taxes to the present time. Paid about $1,-100 for a quarter section. At the time I bought it I didn't know anything about any bonds or assessments being a lien on the land or claim against it. I first learned of this suit several years ago, about the time of the meeting at Hulls, (which appears to have been in June, '89.)

Cross-Examination, by Louis Palmer.

Have lived in the county since '31. Have paid assessments to the present district; didn't think anything about bonds at the time of my purchase, first knew of trouble about '89.

Testimony of George Tryan.

GEORGE TRYAN, by Thos. Worthington.

Am a son of Edwin Tryan living near Rockport, my father died in '71 or '72, when I was 11 or 12 years old. My father died intestate, and my mother Louisa R. Tryan, my brother E. D. 364 *a* Tryan and myself own the lands described which we inherited from my father. My brother was two or three years old in '71. We have been in continuous possession of these lands, adverse to all the world and paid all taxes from our father's death to the present time.

Cross-Examination.

Don't know what part my father took in the levee matter.

Testimony of Chas. Shaw.

CHARLES SHAW, by A. C. Matthews.

Witness offers deed from H. B. Atkinson to himself dated Sept. 15, '87, and other deeds. Also deed from Lucien Scott and wife to Henry B. Shaw dated Aug. 30, '79, and deed from Henry B. Shaw to witness for a part of same land dated Dec. 21, '85, 70 acres of which is in the levee district. My father and I have had continuous possession and paid all taxes each year from '79 to the present time on said lands.

Cross-Examination, by Louis Palmer.

Am a son of Henry B. Shaw, who died in January, '86; the Shaw who was a partner of Mr. Rupert was G. J. Shaw. I knew little of the construction of the levee and had no land there until '85. Think my father took no part in the organization of the levee; when I bought my lands I had heard there had once been some levee bonds which were declared unconstitutional, in the Webster case, and I supposed the lands were relieved from the payment.

Testimony of J. C. Gay.

J. C. GAY, by A. C. Matthews.

Witness describes deed from Mary L. Horton to himself dated June 20, '81, for certain lands. Have been in possession and paid all taxes regularly since that time. My uncles, the Yocums, were interested in the Webster suit, and I heard a great deal about it, and knew the result of it, and I bought my land 365 *a* believing that those bonds would never be collected, and would not have bought my land otherwise at the price I paid. Witness purchased other lands Feb. 25, '93, of William and Milissa Prior.

Cross-Examination, by Louis Palmer.

I bought from Mary Horton and she from Horace Horton. I never heard of any suit commenced in '78, of which this suit is supplemental. Before buying my land I took the opinion of J. L. Dobbin, then a reputable practicing attorney in Pittsfield, and he told me he believed the bonds were wiped out.

CHARLES R. SHAW, Recalled, by A. C. Matthews.

Testimony of Charles R. Shaw —Recalled.

I heard my father discuss the Webster case, and can state that he knew of that decision and its effect before buying the Scott land in '79.

Cross-Examination, by Louis Palmer.

The trade for this land was under discussion for some time, and I heard him speak of that decision during that time. It was discussed among the people at that time, and the conclusion was that the bonds would not have to be paid, and he bought with that understanding, and that there was no lien against his land.

CHARLES H. RANKIN, Recalled.

Testimony of Charles H. Rankin —Recalled.

Witness offers, subject to previous objections, deed from Benjamin Lombard, Jr., to August Shaffer conveying certain lands; also tax deed from the county clerk of Adams county to Almeron Wheat, Jr., date of Aug. 7, '87, and deed from Wheat to Shaffer of Aug. 25, '84; also deed from John H. Duker to Shaffer, each conveying certain lands, latter deed containing this stipulation: "It is expressly stipulated that said Shaffer is to pay all taxes now due or to become due on said lands. Witness produces tax receipts showing payment of taxes by said Shaffer and his grantors on said 366 *a* lands from '80 to the present time, and states that they have had continuous possession thereof during that period.

Witness produces deeds of James Kennedy dated in '91 and '94, and bond for deed under which the same was executed dated '84. Witness produces deed to Frederick Reich dated Feb. 20, '84, and tax receipts paid by Reich and his grantors from '80 to the present time. Witness produces deed from Alfred C. Horn to William Groh dated Jan. 18, '81, tax receipts for taxes paid by said Groh on said land from '81 to the present time; said Groh has had exclusive possession of said lands from the date of said deed to the present time.

Witness produces deed of Edward A. Rogers and certified statement of the county clerk of Adams county in regard to payment of taxes, and states that Rogers has been in possession of said lands from the date of said deed, they being dated in '79, '80 and '88.

Cross-Examination.

Witness does not know what part any of these people took in Levee matters.

y of
nider JOHN H. SNIDER, by Thos. Worthington.

Witness offers deed from master in chancery to Thos. Clarkson dated Nov. 17, '84, and deed from Clarkson to himself dated Sept. 9, '85; has been in possession and paid all taxes since that date. When I bought my land I didn't know there was anything against it; had the title examined, and first heard of this suit in the summer of '89.

Cross-Examination, by Louis Palmer.

I came to the county in '84, and heard nothing about any bonds before I purchased; knew the lands were in the levee district, and it was subject to the present annual levee assessments.

y of
Ward. 367 *a* LYMAN WARD, by A. C. Matthews.

Witness bought certain lands of Louisa Treat in the levee district in '80. His grantor lived in Iowa. I took immediate possession after date of deed, and have had continuous possession since that time, and paid all taxes to the present time. Paid levee assessments since 1881.

Cross-Examination.

When I bought the lands I knew nothing about bonds or I would not have bought. I paid $3,000 for the land, which was a big price. Knew of the construction of the levee and that the land was in the levee district. Have paid assessment to present district. Heard that the bonds had been wiped out, but didn't know anything about them when I bought my land.

H. J. STURTEVANT, by Thos. Worthington. Testimony o H.J.Sturtev

Witness offers deed to himself from James M. Hull dated Feb. 6, '79, and deed from Henry Call to Z. F. Sturtevant of Oct. 1, '79. The latter was my father, who died about 16 or 17 years ago, and I and my brothers inherited from him. We have had continuous possession and paid all taxes from '79 to the present time. At the time I purchased this land and inherited the other land from my father, I had an abstract of title made by J. L. Dobbins, a practicing attorney of Pittsfield, and it shows no claim on account of levee assessments, and I had no knowledge of any such claim when I bought the land. The first knowledge I had of any such claim was about the time of the meeting at Hulls (in '89.)

Cross-Examination, by Louis Palmer.

I first came to the levee district in '80. Never knew of any levee bonds until after I bought my lands. Have paid assessments since 1880.

V. A. GRIMES, examined by Harry Higbee. Testimony o V. A Grim

My wife is a daughter of James S. Irwin, deceased, and she 368 *a* and Mrs. Irwin are devisees under his will. Witness offers various deeds of James S. Irwin dated in '74, '72, '82, '76, '83, '84, conveying various lands. Mr. Irwin died Jan. 5, '94, leaving my wife, Ida Grimes, and his widow, Meribah Irwin, his devisees; most of the taxes are paid since 1880. The above deeds have all been recorded, and Mr. Irwin and his grantees have been in open and exclusive possession of said lands from the date of said deeds to the present time.

Cross-Examination, by Louis Palmer.

Think Mr. Irwin signed the petition for the present district and perhaps the trust deed. He was a lawyer and knew of the decision in the Webster case, and gave it a great deal of study, and wrote an article published in the county paper, probably in '80, to the effect that the Webster case settled the old bond question.

ay of
gers.

E. A. ROGERS, by Harry Higbee.

Witness owns over a thousand acres of land in the levee district, and introduces deed from Timothy Rogers to himself dated March 15, '88; the grantor was my father; also deeds to said Timothy Rogers dated Aug. 21, '80, and states that about all of his father's lands were purchased about that date. Witness also introduces deed from his brother, T. M. Rogers, to himself for certain lands dated in '93, and deed from his father to said T. M. Rogers for same lands dated March 15, '88. My father and his grantees have been in possession of these lands claiming adversely to the world, and have paid all taxes thereon from '80 to the present time. I had nothing to do with the levee district and knew nothing about it prior to '80.

Cross-Examination, by Louis Palmer.

I did not sign the petition for the district in '80. At the time of the deed from my brother to myself in '93, when his deed contained a reservation in regard to the levee bonds; I knew this
369 *a* suit had been commenced, and knew that this reservation meant that I would have to pay them if collectable. I knew nothing of any decree of U. S. Court declaring these bonds a lien on the levee. I had been told there were some old bonds and they had been declared unconstitutional by the Supreme Court, but never saw the decision.

ay of
L. Allen

ALBERT L. ALLEN, by Harry Higbee.

Witness introduces deeds to himself dated Nov. 8, '73; also deed to his brother, Alden Allen, for certain other lands of about the same date. My brother lives in New York State. We have each had possession of our lands and paid all taxes from the date of said deeds to the present time.

Cross-Examination, by Louis Palmer.

Think I signed the first trust deed; didn't pay assessments to the old district. Heard some bonds had been issued. Pay assessments to the present district. Presume I paid all assessments to the old district I was called on for.

J. L. DOUD, by Harry Higbee.

Testimony J. L. D

Witness offers deed from A. D. Bining to himself dated March 7, '82. Have had possession ever since and paid all taxes, and Mr. Bining had possession some years before and paid taxes and gave me receipts. I came from near Chicago and knew nothing about the levee or levee bonds when I bought my lands. Witness introduces certain other deeds. It was not until some time after I purchased that I heard any bonds had ever been issued.

Cross-Examination, by Louis Palmer.

I came down from near Chicago and looked at the land and went back and had an abstract of title, and sent my brother down to close the trade, and I didn't know there was any levee there at all, and didn't know the land was subject to overflow.

370*a* JOHN H. BRAMMEL, by Harry Higbee.

Testimony of John H. Bram

Witness introduces deed from administrator of William Minton dated Dec. 21, '72. I have been in possession and paid all taxes from that date to the present time. I was familiar with the construction of the original levee and knew that the object of the landowners was both to build and maintain the levee and that both were an inducement to people who went into the project. In the construction of the levee the puddle ditch in the center was not put in in places. I saw logs and stumps covered up in there myself. Mr. Corthell, the chief engineer, was superintendent of the Louisiana bridge, and he had a lot of young fellows, in there, and every day or two they were on a spree at Hannibal or elsewhere, and the contractors would take advantage of it. I saw the contractors cover up logs; one was two and a half feet through, so big a team could not haul it, saw logs and stumps covered up at various places, one stump came within three and a half feet of the top of the levee, and it broke there afterwards at what was known as the "James Break." The ground for the levee was not thoroughly grubbed before the levee was placed on it. At the time the levee was built I knew the high water mark of '51. It was preserved on a warehouse at Cincinnati. The levee was not built as high as the '51 mark. I don't think the old levee was ever fully completed. I knew of the decision in the Webster case under which the case was declared unconstitutional. Knew of the break in '76. After that the lands were almost worthless, crops were destroyed, two thirds of the land was abandoned and many people

broke up. The land was pretty nearly worthless. This was about the same time as the Webster decision. There was then no means to repair the levee except by voluntary donations, and some went into the deed of trust. The old commissioners 371 *a* never acted as commissioners of the district after '76. I signed the petition of '80. The present levee has at least as much again earth as the old one, and where there were breaks in the old levee it was repaired on new ground. Witness details various breaks in the levee and the work done on it. When there was high water the commissioners put men on the levee and patrolled it and did a large amount of work to protect the levee at great expense. The land owners at all times endeavored to protect the levee and prevent breaks. The present levee is constructed on a different basis than the old, with different slopes, etc. The different breaks caused great loss and each had an injurious effect on the value of lands. Nearly all the district is now in cultivation. The decision of the Supreme Court in the Webster case was generally known to the land owners in the district, and was taken into consideration by people who have since purchased lands. It was a general subject of conversation and it was understood that the bonds were no longer a lien on the land. Witness estimates the loss to the district in '76 in wheat alone to have been $126,000, and in corn $48,000; that the break of '80 caused a loss in wheat of $189,000, and in corn of $60,000, and the break of '81 caused a loss of $500,000. At the time of the break of '81 the wheat was in the shock and the corn was laid by. We estimate the loss from the break of '88 in wheat at $504,000, and of corn $180,000, and a total of losses in crops alone from the breaks in the levee at $1,600,000. And we estimated the loss from other causes at $750,000, making a total of $2,357,000. These figures were made by Capt. Massie, a merchant and skillful accountant who has done a large business for years at New Canton, buying wheat, corn, etc., and myself and others were associated with him in making the estimate.

Objection by complainants to move to strike out all the testimony relative to estimate of losses as being irrelevant, immaterial and incompetent.

372 *a* Cross-Examination, by Louis Palmer.

I was often on the levee and saw them working. When the river was high the levee broke and did not save our crops until '92. I was present during the high water of '51 and know its

height. I signed the petition for the formation of the district and the trust deed. Knew the commissioners. They built on same general lines as old levee except where they had a break. I heard of the suit of Mr. Palms and of the decree of Judges Treat and Drumond. Testimony of John H. Bramme

JOHN H. WHEELOCK, by Harry Higbee. Testimony of John H. Wheelock

Witness introduces deed from John T. Wheelock and wife to himself dated June 1, '87. I and my grantors have owned this land at least since '80, and have been in possession and paid all taxes since that time. Witness also introduces deed dated Dec. 7, '81. Have had possession and paid all taxes since that time. Also inherited certain lands from his father's estate, who died over two years ago.

Cross-Examination.

Am a son of John G. Wheelock, one of the original commissioners. I knew of the construction of the levee and of the Palms suit—have since learned of it: didn't know of it at the time. Gives names of his brothers and sisters. Didn't know anything about the litigation at the time I bought my land.

LOUIS VOIGE, by A. C. Matthews. Testimony of Louis Voige

Witness introduces deed from Elizabeth Wilton and others to himself dated Dec. 3, '79. Live on the land and have had possession since 1879 and have paid taxes continually to the present time. Have other lands bought in '92.

Cross-Examination, by Louis Palmer.

When I bought my lands I knew there had been some bonds and had heard they had been declared void.

373 *a* ETTA HARDIN, by Harry Higbee. Testimony of Etta Hardin

I live in Louisiana, Mo. Witness introduces deed of H. B. Atkinson and B. H. Atkinson dated June 30, '88; also deeds to William A. Jordon and Etta Hardin dated June 14, '87, for certain lands. At the time of these purchases I had no knowledge whatever that any bonds had been issued for the levee district, and knew of no lien on the land.

ony of
. Hardin.

Cross-Examination, by Louis Palmer.

I knew nothing about the levee when the lands were bought; my husband bought them for me, and didn't mention it to me at the time.

ony of
. Hardin.

N. C. HARDIN, by Harry Higbee.

At the time these lands were bought for my wife I had an examination made of the title. I had one abstract by Chamberlain Brothers and another by Mr. Thos. Williams, and I remember Mr. Worthington said the title was all perfect. I examined the abstract myself and it was perfectly satisfactory to me. The abstracts showed no lien by reason of the levee bonds, or anything of that kind. My wife went into immediate possession and has had continuous possession and paid all taxes since date of deed. I was not familiar with the levee district before those purchases.

Cross-Examination, by Louis Palmer.

I had heard something about levee bonds, but had also heard the Supreme Court of Illinois had declared them null and void. Made no investigation to see whether the bonds had been paid. I never heard of a suit instituted in '78 in the U. S. Court, nor of the decree of Judges Treat and Drummond. I am a lawyer myself. I now own the land bought by my wife.

ony of
. White.

W. F. WHITE, by Harry Higbee.

Witness appears as agent for his wife, Mary White, who when
374 *a* he married her, was the widow of Joseph N. McFarland and for the heirs of said McFarland, namely: Nathan J. and Sarah McFarland. He introduces deeds to said Joseph McFarland dated in 1875. Said Joseph died in '78, and he and his heirs have had continuous possession of said lands and have paid all taxes to the present time. They do not live in the levee district.

NORMAN DICKSON, by Harry Higbee.

Testimony Norman Dick

Am acquainted with the present levee and worked on it one-half day in the high water of '92, carrying sandbags, etc. The levee was constantly patrolled from one end to the other and a great deal of work done to prevent it from breaking. The old levee was not half as large as the present, and the water of '92 would have gone over it but for repairs made. I examined the levee soon after the break of '88, and I saw a log perhaps a foot through and a large trunk sticking out of the end of the levee where it was cut across by the water. Don't know how they got into the levee. Parties could raise crops this year outside the levee as well as inside.

Cross-examination, by Louis Palmer:

I saw the log and stump the next year after the breaking of the levee, and they must have been there at the time the levee was constructed. They were in the end of the levee where it broke. Logs in a levee cause a break, they rot and leave a hole and cause the water to run through. The log and stump were about the bottom of the old levee. They could not have got in there after the levee broke. Six or eight feet of the log was sticking out of the levee, near the surface of the ground, at the bottom of the levee.

ISAAC BARTON, by Harry Higbee.

Testimony Isaac Bar

Introduces deed of Nov. 13, '84, for certain lands, and has
375 *a* been in continuous possession and paid all taxes from that date to the present time. It had been previously owned by Thos. Ousley, and he had been in possession for at least four or five years before my purchase. Had heard of the Webster decision before I bought this land, and it was generally understood in the neighborhood that that decree destroyed the validity of those bonds, and that there was thereafter no lien on the land.

Cross-examination:

Present commissioners have charge of old levee except when they have changed.

ony of
Robb.

CHARLES ROBB, by Harry Higbee.

Introduces deed for certain lands to himself from Lillie Brown dated Aug. 23, '84. Also deed from Maj. McGatt dated March 1, '89. This land belonged to Joseph McGatt, deceased, and my wife was one of his heirs. Said heirs and myself have had possession and paid all taxes since at least '82, and McGatt had had possession for at least 30 years prior thereto, and taxes were paid for at least 15 or 20 years. Witness also introduces deed from Edward Prince dated Dec. 27, '90, and states that Prince and himself had had possession for at least 30 years and paid all taxes.

Cross-examination:

I never knew anything about bonds until late years.

mony of
s W.
Seymour.

CHARLES W. SEYMOUR, by Harry Higbee.

Witness introduces deed to himself dated May 5, '57, from Lucius Kingdom, and now owns part of land therein described; also deed from Alfred Seahorn dated Feb. 27, '80, and deed from Phillip Fusselman dated in '86, and other deeds. Witness has had possession of said land and paid all taxes each year from the date of said deeds respectively.

Cross-examination:

Paid levee taxes for '73 and '74. Didn't sign petition for
376*a* levee district, nor deed of trust. Knew that levee bonds were issued.

mony of
H. Starks

WILLIAM H. STARKS, by Harry Higbee.

Witness introduces deed dated in '92, and other deeds in chain of title reaching back to '69. Got title through my father, James W. Starks, who died in '91, leaving certain heirs named. Witness introduces deeds dated in '95.

Cross-examination:

My father lived in Missouri.

Statement o Charles W. Seymo

CHARLES W. SEYMOUR, resuming the stand.

Witness states that his brother, Edward Seymour, is sick, and offers for him certain deeds dated in '63, and states that he had had possession and paid all taxes since that date on lands therein described.

Testimony o William Pry

WILLIAM PRYOR, by A. C. Matthews.

Witness and his wife formerly owned N. W. Sec. 12, 6-5, sold to James C. Gay. My wife's father, William Wood, lived on the land for many years. I have a deed for the lands dated in '87 from the heirs of William Wood. We had possession of this land for many years and paid all taxes, and claimed it as against any lien.

Cross-examination, by Louis Palmer:

I knew of levee bonds being issued. About 100 acres of this land never overflowed during any breaks in the levee and ought not to be in the district. Paid some levee assessments on part of land to present district.

Testimony o James C. Ga —Recalled.

JAMES C. GAY, Recalled, by A. C. Matthews.

Witness introduces deed from Mary L. Horton to himself dated June 20, '81. 76 acres of this land is in the levee district.
377 *a* Witness introduces tax deed dated July 26, '81, to Mary Horton, and deed from her to himself of May 19, '84. Has had possession and paid all taxes to the present time. I knew of the Webster case and bought my lands with the understanding that the levee bonds were not a lien against them. Witness introduces certain deeds to Mary L. Horton, who is sick and cannot attend, said deed being dated Oct. 14, '84, which are to come up under complainant's objection. She has had possession of the land and paid all taxes since; also, deed to her dated Dec. 26, '83. Miss Horton has been in possession and paid all taxes since that date.

NORTON H. CLOSE, by A. C. Matthews.

I live in Kinderhook and lived there while the levee was building. Never owned or occupied any lands in the levee district. Am not certain whether I signed the petition for the organization of the district or not. Have lived in that neighborhood ever since and have not heard of any other N. H. Close.

A. L. WARE, by A. C. Matthews.

Lived at New Canton in '72 to '74. Think I signed the petition for the levee, as I would casually sign a petition with nothing to it. Never owned or occupied any land in the levee district. I signed this petition. Knew John Head and Henry Howard whose names appear on the petition. Don't think they ever owned any land in the district. Don't think that C. E. Dike owned any, and he didn't live on the bottom but lived in New Canton.

Cross-examination:

I signed the petition on faith not knowing much about it.

C. B. GOSE, by A. C. Matthews.

I lived on a farm near Kinderhook until December, '71, and 378 *a* went to Wisconsin and remained until July, '73. Don't know whether I signed the original petition for the levee or not, would know my signature. (Counsel for complainants have not produced the original petition, pursuant to notice served.) Copy of first petition shows names of R. M. Murray, A. A. Gose, C. B. Gose and Samuel Clark in succession. Have no recollections of it. There was no other C. B. Gose in that neighborhood. Have lived there all my life and am well acquainted. I owned no lands in the levee district and occupied none. I remember the time when they were getting up the levee business. Was at one time treasurer of the levee commissioners and became familiar with the names in the district. There was no other family by the name of Gose in the district.

Testimony of C. B. Gose

Cross-examination, by Louis Palmer:

I bought some lands in the district in '88, and presume I knew that some bonds had been issued. If I signed a petition I owned no lands at the time in the district. Won't deny that I did sign petition, but don't remember.

A. A. Gose, by A. C. Matthews.

Testimony of A. A. Gose.

Resided near Kinderhook in '71, near my brother, C. B. Gose. Don't remember signing the petition.

WILLIAM H. BEACOM, by A. C. Matthews.

Testimony of Wm. H. Beacom

Witness introduces abstract of deed for certain lands dated Feb. 25, '80, and for other lands dated Nov. 21, '91; have had possession and paid taxes from date of deed. Have put $4,000 in improvements on lands in Sec. 17. Bought part of the land from Edward Sharpless who lived at Marion, Ohio, never lived here, and part from Mr. Irwin who is dead. Before buying land I knew of the Webster decision, and had the title to the three-quarters in 17 examined by William A. Grimshaw, a lawyer of good repute and standing, now dead. I have heard that under 379 *a* that decision the bonds were illegal. I also spoke to Judge Higbee about the bonds; but employed Mr. Grimshaw professionally. He said he had no doubt the bonds were illegal and that there was no law to collect them. Had a similar talk with Judge Higbee, and on such authority purchased my land. The building of the levee has been a damage to the lands in Sec. 9, as it has filled up the Sny and the creeks run over the land. I took no interest in levee matters prior to my purchase in '80. Lived 20 miles from district at New Salem.

Cross-examination:

Had conversation with Mr. Grimshaw in '79 or '80, soon before purchasing. He said nothing about a case in the U. S. court against the land. He had to some extent acted as agent for the vendor in paying taxes, etc. Had heard bonds had been issued.

R. M. MURRAY, recalled, by A. C. Matthews.

I signed the original petition for the levee district. I neither owned nor occupied any lands in the district at that time, and don't now. I have an impression that C. B. Gose and I were together when we signed it, but not positive. My recollection is very clear that I signed it and think Mr. Clark was present near my house. I have seen the list of signers for the first and second petitions for levee assessments. Have lived for many years on the edge of the district, and have been generally acquainted with the names of land owners in that neighborhood. I was county treasurer in '77, and at the time these petitions were presented knew nearly everybody around there. From such examinations I do not think that more than one-third of the land owners in Tps. 4-7 and 4-8 (which was then all in Kinderhook), owned land in the drainage district, signed these petitions. I have examined 380 *a* the list carefully to determine this question. My land was above the overflow district.

Cross-examination:

I compared the names on that list with the actual land owners in '72 and '74, as I knew them. I have been aware of this fact for years, but made this examination recently. I was one of the first commissioners under the present organization, from perhaps February, '80, to May, '83. We took possession of the levee, which I heard was in the hands of the receivers. Don't remember getting their consent. I knew bonds had not been paid. We didn't receive any possession directly from the receivers. I know that after the decision in the Webster case and the break of '76 that all work done on the levee had been done by voluntary contributions, until the new organization was completed in '80. The land owners seemed to be in possession of it. We didn't find any receivers in possession. I heard some trust deeds had been made. When we took possession apparently the men who owned the land had possession of it, or nobody in possession of it, no objection was ever made.

Testimony of Charles P. Robb – Recalled.

CHARLES P. ROBB, recalled, by Thos. Worthington.

I lived between Kinderhook and New Canton in '72, and in the latter since '82. Have owned land in the district since '84. I was generally acquainted with the land owners owning land in Kinderhook and Pleasantvale Townships, being Tp. 4-7, 4-8, 5-6 and 5-7. I have examined the list of parties who signed the petitions of '72 and '74, and compared them with the owners of lands in the district with whom I was acquainted at the same time, and in the neighborhood in which I was acquainted I find 23 names of land owners on the petitions, and 95 land owners 381 *a* whose names are not on them. Am not positive as to all the names being land owners, but am positive that a large majority of land owners in those townships did not sign the petitions. Can furnish the lists if desired.

Cross-examination, by Louis Palmer:

Am in the real estate business. I know nothing of the meetings held in '72. I am not in doubt of about 95 people in that neighborhood who did not sign that petition, but am in doubt about some others, but I trust to my recollection, don't go to the records. Witness names parties of whom he is not certain, and names many who were then land owners. Complainants object and move to strike out. I am a defendant in this case and a justice of the peace in my town. A great deal of the land was uncultivated at that time, and I was not positive who owned it.

Testimony of J. W. Brammel

J. W. BRAMMEL, by Thos. Worthington.

Have testified before in this case. I have lived since '57 in Pleasantvale Township in what is now the levee district, and was well acquainted in that neighborhood. I have read and heard the list of names produced by Mr. Robb, and I know that a number of the persons named by him (who did not sign the petition) owned land in the district at the time. Witness names certain land owners with whom he was acquainted. I examined the original petition and the name was not in my handwriting and not

mony of
Brammel.

exactly the same name. I don't think that John Head owned any land in the district at the time of those petitions, and before that time had sold his land to Caleb Gordon, and then was living in the town of New Canton. Don't think Edwin E. Dike owned any land in the district or ever owned any. C. M. Brammel was a brother of mine, and he never owned any land in the district.

P. H. Davis had possession of a tract in the district for a year 382 *a* or two from which he was afterward ejected.

mony of
s J.
Ward.

THOMAS J. WARD, by Thos. Worthington.

I resided in Rockport in '71 and '72; was well acquainted with J. M. Henry, and he owned no land in the district until he bought a tract from me in the winter of '77. I was acquainted with Alexander Benjamin, who then lived in Rockport, and don't believe he owned any land in the district. I knew W. M. Harris and don't think he owned any land in the district. I knew Adam Myers and don't think he owned any land in the district. Myers, Henry and Harris are dead, and Benjamin has gone to California.

Cross-examination, by Louis Palmer:

Not familiar with titles. Am simply giving impressions.

mony of
uel Myers.

SAMUEL MYERS, by Thos. Worthington.

I am a son of Adam Myers, and have lived in Atlas township or just across the line all my life. I am 39 years old and lived with my father in '71 and '72. He never owned any land in the levee district to my knowledge.

Cross-examination, by Louis Palmer:

My father never owned any land down in the bottom, but owned land near there down on the hills.

mony of
uel
Pfrimmer

SAMUEL PFRIMMER, by Thos. Worthington.

Have lived in Tp. 5-7, now Cincinnati, formerly Pleasantvale, for over 50 years, and have been well acquainted with land owners in that neighborhood. Have heard the list of names as read by Mr. Robb, and know about all of them, and think that they were land owners, or were represented to be, in '71 and '72. Witness names a number of land owners.

FRED P. HOFFMAN, by Harry Higbee.

Testimony of Fred P. Hoffman.

Witness in May, '82, bought certain lands described from
383 *a* Philander Shipman, and obtained warranty deed without reservation. Have had possession since that date and regularly each year paid all the taxes. I came to New Canton in '75, and when I bought my lands knew nothing about the old levee matters.

Cross-examination.

Never heard the levee bonds had been issued, but knew there was a levee built. Have paid my assessments since 1882.

ORLANDO CAMP, by Harry Higbee.

Testimony of Orlando Camp.

Witness offers deed from Samuel Camp dated Sept. 30, '80, conveying to him certain lands. Took immediate possession and has had exclusive and continuous possession, and has paid all taxes each year from date of deed to the present time. When I bought my lands I had heard of the suit in regard to the levee bonds and that they were unconstitutional. First heard of this present suit about five years ago, not long before the meeting at Hulls.

Cross-examination, by Louis Palmer:

I knew when I bought my lands that bonds had been issued. Bought my lands on the belief that the Webster case settled them all and they were not to be paid.

DANIEL HACK, by Harry Higbee.

Testimony of Daniel Hack.

Witness introduces deed from Geo. Hack and wife dated May 30, '79, for certain lands, being warranty deed without reservation; also deed from one Pennick dated Apr. 2, '81, deed dated Jan. 6, '76, and one dated Mar. 2, '81. Have been in possession of these lands since date of deed, and of part of them some six years prior thereto under bond for deed, and have since had open and exclusive possession of all of them and paid all taxes on them from that time to the present. Have lived in Kinderhook most of my life, am 47 years old. Was familiar with the bottom and
384 *a* the people living there in '71 and '72. Pages 602 and 606 witness names a large number of parties who owned land in the district at that time.

Testimony of Jas. Hack. Cross-examination, by Louis Palmer:

I got my first deed in '79, and paid all taxes that came against me. Had heard of bonds but thought they had all fell through. Don't know nothing about bonds to construct the levee.

Testimony of G. W. Archer GEORGE W. ARCHER, by Thos. Worthington.

Am circuit clerk and ex-officio recorder of Pike county, and have held the position for about seven years. Am familiar with the records in the office. I have examined my office carefully, and my deputy who has been there for 18 or 20 years has also examined it, and we have failed to find any record in that office of an assessment for levee purposes made in '71 or '72 and in '74 or '75. There is a general tract index book kept in the office showing conveyances affecting all lands in the county, and those indexes show no such assessment.

Cross-examination, by Louis Palmer:

I have never seen such assessment books in that office. My deputy is now out of the state.

Testimony of S. E. Hewes. S. E. HEWES, by Thos. Worthington.

I made an examination of the recorder's office of Adams county to ascertain whether there was any record of the levee assessments of '71 and '72 and '74 and '75. Objection by complainant on the ground that the proper foundation had not been laid and it was not the best evidence. The examination was careful. There is in that office a tract index of all lands, and I examined the index books for Tp. 3-8, in which all the levee lands in Adams county are situated. I found nothing on such index books in that office relating to levee assessments for the year '72 or '74. There is no record on the tract index and no entry on 385 *a* the record books that I could find. There is a small book there of the assessments of '72 or '74, that was filed Oct. 13, '80, but was never recorded. I could not have found that book by my own searching, but I went to Mr. Brophy, the present Circuit Clerk, who was formerly recorder, and his clerk said there was an old book left there, he didn't know how long it had been in the office, but it was never recorded and never put on the entry book or tract index. The file mark of Oct. 13, '80, is in the handwriting of Mr. Brophy. The only assessment entered on the tract index is that of the assessment under the present organiza-

tion made in '80. Complainant's counsel moved that the testimony of the witness be stricken out as immaterial, irrelevant and incompetent. Testimony of S. E Hewes.

R. M. MURRAY, recalled, by Harry Higbee. Testimony of R. M. Murray —Recalled

I heard the list of names read to Mr. Hack and heard him testify as to parties who were owners of land in the district in '71 and '72. I was acquainted with every one on that list and I am very sure as to all but one that they owned land at that time in the levee district. I have lived very near the district nearly all my life.

C. C. DEWELL, by Harry Higbee. Testimony of C. C. Dewell.

Witness introduces abstract of quit-claim deed from Abby W. Green dated Oct. 1, '89. J. N. Duel conveyed to her Sept. 25, '89, and the land was conveyed to him by Andrew House Oct. 26, '74. Myself and grantors have had continuous adverse possession since '74 and I know that taxes have been regularly paid since that time.

Cross-examination:

I knew there had been levee bonds and understood there had been a decision rendering them void. I had my title examined and there was no lien reported to me on account of levee bonds or assessments. Examination was made by Mr. Hoit of whom my brother borrowed some money.

386*a* A. SHINN. Testimony of A. Shinn.

I knew Dr. J. M. Henry, who lived in Rockport, now dead. I was well acquainted with him, and he was my physician, and I am satisfied that he owned no land in the district until a year or two after the '76 break. Objected to as not the best evidence. I knew A. Myers and don't think he ever owned any lands in the levee district. Knew Alexander Benjamin, who lived at Rockport, near which my lands were situated, and never heard of his owning any land in this district. Was acquainted with William Harris and never heard of his owning land. All those transfers of levee land in our neighborhood were pretty well known when they occurred.

imony of
am H. Gay
called.

WILLIAM H. GAY, recalled, by Thos. Worthington.

I was well acquainted with Dr. J. M. Henry, and owned land in the levee district adjoining him, and transacted business for him. He owned no land in the district until after the levee broke in '76. I knew Adam Myers; never knew any other A. Myers. He lived near me, but not in the district, and I think he never owned or occupied any land in the district. I have made inquiry of his family and otherwise to ascertain that fact. I knew William Harris. Don't think he owned any land except a little house and lot in Rockport, not in the levee district. I knew Alexander Benjamin, who was a merchant, and I used to transact a good deal of business with him, and knew a good deal of his business, and to the best of my knowledge and belief he didn't own any land in the levee district. Witness introduces warranty deed from Thomas J. Fesler to himself dated Sept. 4, '87, conveying certain lands and containing special clause following the warranty: "Except as to levee assessments;" also quit-claim deed from B. H. Atkinson, executor of the last will of R. M. Atkinson, conveying S. W. Sec. 24, 6-6. Paid for N. W. of Sec. 19, bought of 387 *a* Fesler, $250, and paid some levee assessments. Paid for the Atkinson quarter $96 and some levee taxes under the present organization; don't remember the amount. Took possession immediately after my purchase, and have had continuous possession and paid all taxes each year to the present time. Before purchasing these lands I had heard of the Webster decision, and understood that the old levee bonds and old levee law had been declared unconstitutional and void by that decision. That was a matter of general discussion and understanding in that neighborhood.

Cross-examination, by Louis Palmer:

I signed the trust deed, the object of which was to raise funds to patch up the levee and exist until we could get an amendment of the constitution of the state and legislation under that amendment. After that decision we didn't expect to pay for the old bonds, and when I bought my lands I believed there were no old levee bonds, excepting those that were unconstitutional and void. I didn't think there was any moral obligation to pay them because I and other land owners in making our investments had relied on the same law that the bondholders had relied on, and I thought we had both lost by the failure of the same law. We lost our money, time, crops and improvements. I signed the

trust deed. The land owners first took possession of the levee and I was one of them, before the levee broke in '76. We took possession by our own authority, acting in self-defense against the water. There was no law by which to keep that levee in repair, and we had invested our money in crops and improvements there, and by the law of self-defense or human nature we went there and took possession of it, and worked to keep it from breaking to save our investments. We worked hard and spent time and money.

Testimony of William H. G — Recalled.

We did it without authority from any one, acting for just our
388 *a* self-preservation. It was not with any intention to pay bonds, but to protect ourselves. I will say this for the bondholders, that if the law had sustained us in protecting ourselves I believe it would have been right and just to pay them for the money invested for that work; but as the law failed to sustain the one party, I think morally it was right that it should fail to sustain the other party. I signed the petition for the present district, and they had in part built on the old levee and in part built on new ground, abandoning the old as worthless. I knew little of the original construction of the levee.

CHARLES B. GOSE, recalled.

Testimony of Charles B. Go —Recalled.

(Complainants having failed to produce the original petition of '72 with the names of the signers in their own handwriting, and also the original petition of '74, a copy only has been produced, and the witness is examined so far as that will permit.)

I have lived for many years near Kinderhook near the boundaries of the levee district. I owned no lands in the levee district prior to 1888, and my brother, A. A. Gose, owned none. I lived near him, was acquainted with his business, and state this as a fact. When I was collector of the drainage district, the names of the land owners would pass under my observation. The collector's books I had contained the names of the owners. I never knew of any other C. B. Gose or A. A. Gose in or about the district except my brother and myself. R. M. Murray and S. Clark, whose names precede and follow ours, live in that neighborhood, and the latter owned land in the drainage district.

Cross-examination:

I have no doubt that the C. B. Gose and A. A. Gose, whose signatures appear on that copy of the petition, are those of
389 *a* myself and brother. I acquired some land in the drainage district in September, '88. Witness asked as to various parties whose names appear on petition.

Testimony of A. B. Gose recalled

Certified copy of the order of the County Court of Pike county, Illinois, of January term, '75, on petition of A. C. Matthews, that his name be stricken from the petition in the matter of C. N. Clark et al. (for second levee assessment), and that it be treated as not signed by him; and that the name of said Matthews was stricken from said petition. By stipulation said copy goes in evidence with the same force and effect as the original.

Defendants reserve the right to introduce as much of the record in the case of the People vs. Webster and of Webster against the people on appeal as they may deem important.

Testimony of L. A. Chamberlain

L. A. CHAMBERLAIN, by Thos. Worthington.

Am assistant cashier of the First National Bank of Pittsfield. Have been acquainted with the records of the recorder's office of Pike county since '83 or the early part of '84. Was connected with my brother, E. J. Chamberlain, in making a set of abstracts to include all the land records of this county. In that work I have become very familiar with the records and indexes in the recorder's office. Witness examines "bound book exhibit A" purporting to contain a copy of the assessments made in '72 and '7 4-5. I have examined this book and will state that I have never found in the recorder's office of this county any record whatever of these assessments. I did not find or see in that office any original book containing those assessments originally. The recorder keeps a tract index of all the tracts of lands in this county. and I never saw any of these assessments noted on them. 390 *a* and from my frequent examinations can state that there is no such record or index in the office.

Testimony of E. J. Chamberlain recalled.

E. J. CHAMBERLAIN, recalled, by Harry Higbee.

I am a civil engineer, and am also interested in a set of abstract books of the lands of this county. I assisted in making up those books, commencing in the spring of '84. We had access to all the books in the recorder's office, and were almost every day working in that office in the summer time and a good part of the winter, and I had direct charge of the work for four or five years after the commencement in '84 until my brother got fully acquainted with it. I am still familiar with the records in that office. In making my abstract books I searched all books of record in that office that would in any way affect the titles of lands. I found in that office no book purporting to be an assessment of

the year '72 or '75—nothing prior to the assessment of '80 under the new organization. I have never found any book in said recorder's office of which this bound book "Exhibit A" is a copy, and nothing similar. There has been no record of any such assessment in that office since '84, except that of the assessment of '80 under the new district. There are tract indexes kept in the recorder's office, but there is nothing on them relating to the assessments of '72 and '75. We have compared our books as to every tract of land with the tract indexes in the recorder's office, as well as the records. We have made abstracts of lands in the levee district and no lien for levee assessments made prior to '80 appears on said abstracts, and I have never seen an abstract made by the Circuit Clerk or any one else that showed any assessments made prior to '80. There were copies of the assessments of '72 and '75 in the County Clerk's office, and I have seen them, and they appear to be similar to this exhibit "A."

391 *a* In my former testimony I made an estimate of the expenditures on the levee for the present district made since '80, which estimate comes down to Dec. 6, '93. It appears in volume three of the testimony in this case. Lines 14 to 22 inclusive, of page 369, are for a portion of the year '93, and by cancelling those lines the report of expenditures will commence with the closing of the fiscal year ending July, '93. The amount expended, exclusive of the engineering department, for the year ending July, '94, was $87,771.28, and for the year ending July, '95, $59,848.40. The amount of other expenses not included in the above estimates, for engineering department, salaries, etc., for the years '90 to '94, both inclusive, is $33,179.38, and for the year '95, as reported by the secretary, S. E. Hewes, these incidentals are $3,571.57. The total expenditures given in my testimony for the years '80 to Dec. 6, '93, was $425,638.34, and after deducting the fraction for '93 above referred to, $63,081.55, equals $362,566.79, and adding the expenditures for '94 and '95, gives a total of $527,076.08, for the years '80 to July, '95. This does not include any amount for repairs prior to '80 nor the expenditure by the U. S. government. In this estimate I have included certain expenditures for right of way obtained by the present organization since '80.

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A. C. MATHEWS, recalled, by Thos. Worthington.

I own S. E. of Sec. 12, S. E. 11 and N. E. 4, Tp. 6-6, reside in Pike county and am familiar with the levee district. Bought these lands in '73 and '74, and have had absolute possession since that time, all under fence, most of it in cultivation with houses and tenants on the land, and my possession has been adverse to everybody. I paid all taxes each year since I have owned said lands. These lands were owned by Mr. Scott Wike and myself in common until we divided them in '88. I have known all about the
392 *a* decision of the Webster case in '76, and we lawyers have regarded that decision as settling the validity of the bonds and assessments adversely to the bonds. Since that decision I have done nothing that I know of which would recognize the validity of said bonds or assessments. My lands were unimproved when I bought them, prairie and timber. I probably paid $400 for one tract and $2.50 an acre for the others. Mr. Wike and I built houses on these lands, three houses on the two quarters in 11 and 12, and fenced them, and in fact fenced most of them twice. We paid our tenants or others for breaking the sod two dollars per acre or more, and some of it had to be grubbed. Our rail fences cost us about a dollar a rod and post and board fences, about a dollar and a quarter. Barbed wire fences were not used in the early days in the district. We used rails and post and board fences. Built about three miles of fence on these two quarters at an average cost of a dollar a rod. The three houses probably cost six or seven hundred dollars apiece. The N. W. of 4, 6-6, was wild land, and we built a house there that cost $2,200 and odd dollars, fenced it up and broke it at the rates I have given. The break of '76 washed our fences off, wrecked our houses and destroyed our crops. In the first break Mr. Wike and I lost something like ten miles of fence, our houses were not washed away but were badly wrecked, and our tenants were driven out. At that time it was difficult to get tenants after a break in the levee. I have made a general estimate of my expenses, and I should judge that the expenses for houses, fences and annual repairs, taxes and assessments are not far from $20 an acre, not including the original cost of the land. We paid two assessments under the original organization, all assessments under the present organization, and our state and
393 *a* county taxes regularly. We went into this enterprise some two years after it was set on foot, and had nothing to do with it prior to our purchases. We owned no land until some time after the first assessment. Mr. Wike and I were then lawyers

practicing our profession in partnership, and after examining the law concluded to buy some lands, and bought the lands with the understanding on our part that the law would be sufficient to build the levee by an assessment against the lands benefited, and to maintain and keep it up for all time to come, and with that understanding we bought and improved those lands. We so advised men in that line as legal advisers, though as that was a matter in which we were all interested we told them in an unofficial way that that was our judgment. My faith in the law was never shaken until I had a conversation with Mr. Hay about the Webster case, and he told me about the Updike case, and there was some doubt about the constitutionality of it. That was the reason I had my name withdrawn from the second petition. I had signed that petition, and before the order was made, having my faith somewhat shaken in the ultimate outcome, I had the petition dismissed as to me. Mr. Wike had not signed it. I did not wish to ask for the levy of an assessment as to which I doubted the validity. When I first went into it I had no doubt, but the doubt grew upon us. Testimony A. C. Math —Recalled.

I was present at the break of '76, and met Mr. Jones on the levee near Hannibal with 500 men. The water was running over the top of the levee and it was not very high. The levee broke, it was absolutely insufficient to hold the water. The decision in the Webster case had been previously handed down, and I proposed to Mr. Wike to sell our lands for whatever we could get, but could find no buyers, except for one tract which we sold for exactly what we gave for the land itself without improve-
394 *a* ments and would have been glad to sell everything at the same rate, and would have been better off financially if we had done so.

We would not have gone into that enterprise except in the belief that the law furnished the means for maintaining the levee by assessments spread upon all the lands in the district, as well as the means for its original construction. We were not land speculators and bought for investment. I believed the land would be reclaimed under that law, and if I had doubted it I would not have bought. I could have bought this land at one time at ten cents an acre. I could have bought at a much cheaper rate before the enterprise was talked of than I could when we purchased, and I would not have touched it except for my belief that the law provided the means for continually maintaining it. That was the general feeling and belief among parties interested in the district.

ony of Matthews alled.

But there were men, especially in the lower end of the district, who opposed the levee, and it was opposed by another class who lived along close to the margin by the bluffs, and once in a while there were men in the bottom who opposed it; but the men who favored the project believed both in the project and in the law, and in the ability to make assessments under the law to carry it out. After the break in '76 and the Webster decision we could make no more assessments, and Mr. Wike and I owned much more land than we do at present, and having our money invested in the enterprise, and others having the same, we attempted by some voluntary action to fill the breaks. About that time the deed of trust was set on foot, and Mr. Wike, Judge Higbee, myself and many others signed it to raise money to fill the holes, with the end in view that we might proceed further and see what would come to our relief; that was a means of self-defense. Our money was in the enterprise, the levee was broken and the law had failed, and we had to resort to voluntary contributions under the 395 *a* deed of trust or abandon it. Our land could be sold for substantially nothing. All are familiar with the subsequent project of having the constitution amended and obtaining legislation under it. It was the general opinion among lawyers in that neighborhood that the decisions in the Webster and Updike cases decided the question against the bonds, and I have doubtless told many that was my opinion, but don't recall names of parties at present.

In addition to the expenses above enumerated we were frequently called upon to pay out sums ranging from a hundred to several hundred dollars at a time to meet threatened dangers to the levee, and were never reimbursed for it. Moreover we had to furnish our tenants with seed wheat and other means of carrying on the farm. In the fall of '79 Mr. Wike and I paid out over $700 for seed wheat, and in the summer of '80 when there was a good wheat crop in the shock and the corn was laid by, there was a flood in July. The levee broke and we lost everything. Our fences were gone again, our tenants driven out, our stock driven to the hills, and it destroyed every acre at that time. The loss to the people on the bottom was estimated at over a million dollars. We again furnished seed and the next summer the flood came in the spring and the levee broke and we lost it all, and so we planted it in corn again, and the corn came up and the flood came in the fall and the levee again broke and we lost the corn crop.

The income from the land was very trifling. To estimate how the incidental expenses for seed wheat, etc., which I have

last mentioned, compared with the income from the land, is a matter of opinion, but from my observation I think that such incidental running expenses of the farms always brought us in debt, or more than equaled our income; certainly that was true up to the filing of the supplemental bill in this case. While we got a crop now and then we lost a great many others. Testimony of A. C. Matthews —Recalled.

396 *a* Cross-examination, by Gov. J. M. Palmer:

I have been acquainted with the Sny bottom since '50, and was practicing law in Pike county in '71. Was never consulted about the law of '71, and had nothing to do with its passage. Knew little about the enterprise until shortly before we bought our first land in '73. My first appearance in court in reference to this matter was when they were making the assessment in '72, when Mr. Hay requested me to appear in the county court and make some objections for a client of his, which I did. I then knew what was going on. Mr. Wike and I bought probably 8 or 10 quarter sections, commencing in June, '73, and running into '75. Knew the lands were in the levee district and that they were assessed for levee purposes. Mr. Wike, with whom I owned these lands in common until '88, is the gentleman who is now assistant secretary of the U. S. Treasury.

SCOTT WIKE, by Thos. Worthington. Testimony of Scott Wike.

I owned certain lands set out in exhibit "X" and formerly owned them in common with Col. Matthews, namely: S. W. 5, N. ½ S. E. 6, S ½ Sec. 14, N. ½ N. E. 23, 100 acres off N. side N. W. 23, all in Tp. 5 S., 7 W.; also undivided ½ S. W. Sec. 33, 5-6, and the S. W. 36, 6-6. Col. Matthews and I purchased the lands in sections 5 and 6, June 12, '74, of Edward Prince for $1,500; also S. E. 14 on Sept. 25, '73, of Louis Dutton for $400; also N. W. 36 on June 17, '73, of William H. Hyde for $500. The lands bought by Col. Matthews and myself were held in common until '88 when we quit-claimed to each other. For the purposes of the estimates hereinafter made I have considered the lands falling to me in that division as having belonged to me during the entire time since their purchase, and the lands falling to Col. Matthews as having been his from the beginning, for the
397 *a* reason we divided the lands as nearly equal in value as we could, considering the costs, expenditures made upon them, etc. I submit an itemized statement of the expenditures, etc., with reference to the lands which fell to my share, for while Col. Mat-

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thews paid half of these expenditures, I paid an equal amount on the lands which fell to him in the division. I will consider the lands in groups or farms, as we have regarded them in our transactions. On S. W. Sec. 5 and N. ½ S. E. Sec. 6, purchased in June, '74, we paid $1,500 purchase money. On these tracts containing 240 acres, we built two and a half miles of fence, making 800 rods, which I have estimated to cost $2.00 a rod since we have built it three times. The first fence was of posts and boards, and it was washed away by the break of '76, and afterwards replaced. In a subsequent break it was again washed away and replaced with wire. This makes a total of $1,600. We broke 150 acres, which I estimate at $2.00 an acre, though it cost more. We built a house for $400, and paid assessments of about $1,819.20, estimating the annual assessment at 22 cents an acre per annum, the assessment of '80 at $1.10, that of '88 at $1.31, and that of '92 at $1.87, which are substantially the exact figures. I estimate the general repairs on the farm at $50 per annum for the term from '74 to '89, when the amended bill was filed, or $750.00—making a total for that farm of $4,869.20. This does not include the purchase money of $1,500.

On the south half of Sec. 14, Tp. 5-7, we built 800 rods of fence, and it was fenced twice and a portion of it three times. I estimate these fences at $1.50 per rod, making $1,200. The breaking of 150 acres cost $300. We built two houses at a cost of about $600. General repairs $750, and the special levee assessments of '80, '88 and '92, and the annual assessments for main-
398 *a* tenance, cost us $2,425.60, making a total for the place of $5,275.60.

On the N. W. Sec. 36, Tp. 6-6, we built three fences of 1¼ miles each, which cost us not less than $1,120; breaking 140 acres cost $280, and general repairs about $750. House cost $200. Levee assessments paid were $1,212.80, making a total for this place of $3,612, or a grand total for the three farms of $13,756.20. These farms embrace 720 acres. This estimate does not include purchase money, nor the amount of assessments paid to the first organization, the amount of which I am unable to state. Think we paid two installments. Can't state how the money was applied. And it does not include amounts paid under the deed of trust, voluntary contributions, nor state, county and local taxes, all of which, excepting the purchase money, I roughly estimate at $2,000. I have not included in this estimate N. ½ N. E. 23, and 100 acres off of north side of N. W. of 23, and undivided half of

S .W. 33, on which expenditures for assessments, etc., would be substantially the same. Adding the $2,000 above referred to makes a total expenditure on the 720 acres of $15,756.00, not including the purchase money amounting to about $2,875.00. I find the undivided half of N. W. 36 was conveyed to me by Col. Matthews Sept. 11, '79, for $525. I consider the estimate of $2,000 for voluntary contributions, etc., too low. This estimate does not include expenses for seed wheat furnished tenants and other expenses of having the farming done, except the estimate for general repairs. These figures are compiled from the best data we have, though not all from regular book accounts. Mr. Matthews and I were much of this time in partnership practicing law. A large portion of the parties owning land in the levee district do not live on and cultivate the land. The lands I have mentioned I 399 *a* regard as a little above the average of lands in this district, and I think my estimates would substantially apply to others. I have estimated the breaking of sod at fifty cents an acre below the usual price, and fencing below what it could ordinarily be done for; but parties living on land and doing their own work might not feel that it would cost so much.

Testimony of Scott Wike.

These lands were cultivated by tenants and we furnished seed, wheat, etc., which at that time cost a dollar to a dollar and a half per bushel for the best seed, which we always bought; and we contracted for a rental of two-fifths, and at present one-half. The returns were nothing for the years in which we had breaks. The break of '80 took our wheat in the shock and took our corn after it had been laid by. That fall we again furnished seed, which the colonel says cost $700, and in '81 we had two breaks in which we lost everything. After each break the lands were left in such a foul and bad condition that it would require two years of cultivation to restore them to the condition they were in before the break, and as a consequence crops were so inferior that our returns, at least up to '89, never amounted to anything like the amount of our expenditures for seed and what we were bound to contribute towards carrying the misfortunes of our tenants. We have done better since the last break, but my honest judgment is that we have not received back down to the present day what we have expended in our effort to farm these lands, not including the moneys embraced in the foregoing estimate for fences, breaking, houses, assessments, taxes, etc. I am satisfied we have not had a dollar of return for the outlay embraced in my first statement, amounting to over $20 per acre. The running expenses of the farm have cost us more than the income. Some owners

of land have doubtless done better, and there were cases where the land was cultivated before the levee was thought of.

We took possession of our lands immediately after purchas-
400 *a* ing them, and have had open, notorious exclusive posses-
sion and have paid all state and county taxes each year to the present time. Have also paid all assessments except those to the first organization after it broke down, and in '89 I permitted the land to go to tax sale for the first installment of the assessment of '88. This was with the view of perfecting the title.

I knew of the decision in the Updike and Webster cases, and I supposed it quite clear that these decisions rendered it impossible by legal means to collect the assessments under the original organization, and I, and I think all our people there, understood those decisions to be the end of the organization so far as any power of perpetuating or maintaining the levee was concerned by law, or of enforcing the payment of assessments for its benefit. After those decisions I never considered the assessments collectable, and we resorted to other means for protection. The break in the levee in '76 and the failure of the law under those decisions occurred about the same time and we had to resort to other means to protect our lands. Since those decisions I have not regarded these assessments as valid liens on my lands. After the break of '76 the Sny bottom went back almost to its condition before the enterprise started. As soon as we could recover ourselves we entered into a voluntary arrangement by which thirty thousand acres of the land was subjected to voluntary assessments, secured by deed of trust, with which we repaired the break of '76. Something was done by individual contributions before the deed of trust, which proved merely temporary, and a large number of land owners refused to go into it, and those who did included only a small portion of their land as a rule. It then became evident that the entire levee enterprise would be lost unless we could obtain a constitutional law under which assessments for its repair, etc., could be enforced.

After the break of '76 we could have sold none of our lands
401 *a* for what they cost us with improvements. The colonel was
in favor of selling for what ever we could get for them, but as we could get substantially nothing I was not in favor of it. As I had pretty nearly my all embraced in them I thought we had better stand by what we had and take further chances.

When I went into this enterprise it was under the belief that

we had a valid law under which the levee could be constructed, and which made provisions for perpetuating the organization and continuing the necessary work by a system of assessments spread upon the lands in the district. I had no other idea but that the levee would be perpetuated, or I would have had no interest in its construction. We were not land dealers or speculators, but sought to make an investment, which was the first I had ever made in lands. It is my judgment that substantially all the parties who invested in the district did so in the belief that this law would enable them to continue the organization and continue the assessments when necessary. Some land owners near the bluffs were opposed to the levee system because it would deprive them of pasturage for their stock.

Cross-Examination, by Gen. J. M. Palmer.

I commenced the practice of law in Pittsfield in '59, and have lived there ever since, except when absent on official business. When I bought my land I thought I knew what the levee law was, but it turned out that I didn't. Know the lands had been assessed, and when I bought believed the assessments to be valid. We paid two installments under the first assessment, but do not know the disposition made of the money. I think the Webster case was decided on the authority of the Updyke case.

We commenced improving our lands immediately after their 402 *a* purchase and built fences which were lost. We lost some buildings from other lands, but not from the lands I have mentioned. On some of the lands some of the original improvements are still there, but none of the original fencing. Some of the restored fencing is there and some has washed away and been again replaced. It is very likely that after the break of '76, and before the deed of trust was executed, that the neighbors voluntarily attempted to restore the breaks in the levee. I did not sign either of the first two petitions, but signed the deed of trust. The law under which the present drainage district was organized was prepared in Pittsfield. Col. Matthews was in the Legislature then. The law was framed so as to enable us to protect our property, whether by repairing and enlarging the old levee or otherwise. I cannot say what duties the commissioners performed, if any, after the decision in the Webster case. I do not wish to be understood as testifying that the old levee commissioners as such were in possession of the levee after that decision. When the law was prepared I had in mind that the result would probably be the re-

y of ke. pairing of the old levee, but I cannot state that was the general idea. While in purchasing my land I took these assessments into consideration, yet at the same time I took into consideration the entire scheme of levee improvements and levee maintenance as embodied in the law then supposed to be valid. I have stated that I never signed either of the first two petitions, but signed the deed of trust; but have no recollection of signing the petition for the present organization.

TESTIMONY TAKEN BY A. C. CRAWFORD, FOR CLIENTS REPRESENTED BY ORR & CRAWFORD.

ony of Clark. 403 *a* SAMUEL CLARK, by A. G. Crawford.

I own certain land in the levee district, and owned most of it before the levee was built. Am the owner of bonds issued to build the original levee to the face value of $2,000, and they are now in the possession of Judge Orr. Nothing has been paid on said bonds but two coupons have been cut off.

Cross-Examination, by Louis Palmer.

I was a subscriber to stock in the Mississippi Levee and Drainage Company, and probably signed the petition for the formation of the district and signed the trust deed, and probably signed the petition of '80.

ony of Rodhouse T. W. RODHOUSE, by A. G. Crawford.

Witness offers deed from J. Smith Thomas and wife dated Jan. 5, '80, conveying N. E. 24, 7-5 to witness. Took immediate possession of said land after date of deed and have had continuous possession and have paid all taxes each year from '80 to '95 inclusive.

Before purchasing said land I knew of the Webster case and understood that as a result of it the levee was declared unconstitutional.

Cross-Examination, by Louis Palmer.

At the time of that suit I was working for Z. P. Webster, the
404 *a* principal party to it, and learned of the result from him and others. Presume I knew that the bonds had been issued when I bought. I never heard of the suit in U. S. court until after I bought these lands.

ANTHONY ROY, by A. G. Crawford. Testimony of Anthony Roy

Witness offers quit-claim deed from Jefferson Orr dated April 1, '87, to himself and A. Curtis for certain lands; also quit-claim deed from Z. T. Webster and wife dated Dec. 9, '75, conveying certain lands to David and Antoine Roy; also deed from Mary E. Snyder to witness dated Dec. 16, '85, conveying certain lands. I took possession of all those lands immediately after date of deeds; have had continuous possession and have paid taxes thereon each year to the present time, and have here tax receipts. Before purchasing said lands I learned of the result of the Webster suit from Mr. Webster, Judge Orr and others, and understood that the bonds were void, and that there was no danger of them ever coming against us.

Cross-Examination, by Louis Palmer.

Knew that levee had been built and bonds issued when I purchased.

Am certain I talked with Judge Orr about the bonds and he said there would never be danger from them.

WILLIAM L. OAKLEY, by A. G. Crawford. Testimony of William L. Oakley

Witness produces deed from Richard Wells and wife to himself dated July 24, '80; also quit-claim deed for certain other lands from H. F. Wells to witness dated Jan. 28, '90. I took possession of those lands immediately after the dates of the deed and have held possession and have paid all taxes each year to the present time, and produced tax receipts. When I bought all these lands I knew Mr. Webster well, and learned the result of the Webster suit, and understood the bonds were done away with, and bought with that understanding.

405 *a* Cross-Examination, by Louis Palmer.

I suppose that I knew of the present suit before I bought the land purchased in '90. Knew my lands were in the levee district, but didn't know they were protected by the levee. "It never done my land any good since I have been there."

Testimony of Barton.

FRED BARTON, by A. G. Crawford.

Witness introduces deed from Ruth A. Allen and the administrators of the estate of Joseph M. Allen, dated June 25, '94, for certain lands. I bought these lands and had a contract for a deed in August, '91. Then took possession and have since held possession and paid all state and county taxes.

Cross-Examination, by Louis Palmer.

Was not served with process in this suit.

Testimony of Webster.

I. D. WEBSTER, by A. G. Crawford.

Witness offers quit-claim deed from Zepheniah T. Webster and wife to himself dated March 28, '84, conveying N. ½ S. E. 17, 7-4; also deed from same grantor to witness dated Aug. 5, '82, for other lands. I am a son of Zepheniah T. Webster, party to the Webster suit, and heard of the result of that suit before buying my land, and understood the bonds were declared unconstitutional and could not be collected. I took possession of said lands immediately after said purchases and have had continuous possession and paid all taxes to the present time.

Cross-Examination, by Louis Palmer.

My titles are all derived from my father, and got my lands with the knowledge of the issue of bonds, etc.

Testimony of Melvina Ross.

MELVINA ROSS.

Counsel for Mrs. Ross (she not appearing in person), who is the widow of Charles T. Brewster, deceased, offers on her behalf and on behalf of the heirs of said Brewster, levee bond No. 41406 *a* for $500, being one of the old levee bonds of the series mentioned in this suit; also bond No. 477 for $1,000, the same being offered for the purpose of protecting the rights of said widow and heirs of said Brewster in case there is a decision of this cause favorable to said bonds.

CHARLES M'CALEB, by A. G. Crawford. Testimony of Charles M'Cale

Witness offers deed from Z. T. Webster and wife to Eli Harshman dated April 11, '81, for certain lands, and deed from said Harshman to witness dated Dec. 26, '81, for same lands; also deed from Z. T. Webster and wife to witness dated Sept. 12, '82, for certain lands, all in Tp. 7-4, said last deed being made to correct a misdescription in the deed from Webster to Harshman first referred to. Witness took immediate possession of said lands after the date of said deed by tenants, and has had continuous possession and paid all taxes to the present time. I knew nothing about any bond suit at the time I bought my land, and until some years afterwards.

Cross-Examination, by Louis Palmer.

Have lived in the levee district ten years; came from Scott county; never heard anything about paying for the levee; knew there were levee assessments to be paid to the present organization.

HERBERT I. MORTON, by A. G. Crawford. Testimony of Herbert I. Morto

Am a brother of Charles E. Morton. Witness offers deed from Jacob R. Braw and wife to Charles E. Morton dated Nov. 26, '77, to N. ½, N. W. 23, 7-5; also deed from M. A. Yocum and others dated Nov. 10, '86, to said Charles E. Morton for certain lands. My brother has been in possession of these lands and paid all taxes to the present time.

407 *a* Cross-Examination, by Louis Palmer.

My brother's daughter is very sick and that is the reason he is not here. Think he knew there was a levee when he bought his land. Think he has lived in levee district about 14 years. Has lived in Pike county about 25 years and is about 40 years old.

SAMUEL WAGGONER. Testimony of Samuel Waggone

Witness offers deed from J. C. Yocum and others to M. A. Waggoner dated April 9, '87, for N. W. Sec. 7, 7-4, and also deed from same parties to same grantee dated Jan. 19, '88; also deed from M. K. Manker and wife to same grantee dated June

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19, '88. Said grantee is my wife, and she has been in possession of said lands from date of said deed and has paid all taxes to the present time.

Cross-Examination, by Louis Palmer.

My wife is an heir of Henry Yocum and obtained an interest in said lands by descent from her father, and the deeds introduced are from her brothers and sisters whom she bought out. Her father was interested with Webster in contesting the levee assessments and we were familiar with matters pertaining to the suit and the result of it, and knew of the construction of the levee.

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HENRY W. PARKHURST,

Deposition of Henry W. Parkhurst, taken by complainants at Chicago, Illinois, before Martha W. Riddell, notary public for Cook county and state of Illinois.

Direct Examination, by Henry M. Duffield.

Henry M. Parkhurst testified as follows: I reside in Chicago, and am engineer of buildings and bridges for the Illinois Central railroad. I have followed my profession for about 25 years. I remember the Sny levee; I was principal assistant engineer during the location and construction of the work except for about 408 *a* one year, when I was engaged in the construction of the bridge over the Mississippi river at Louisiana, Missouri. I had nothing to do with the preliminary work; the chief engineer was Mr. E. L. Corthell. My connection with the levee began with the location of the line on the bank of the Mississippi river. I started the location of the levee a few miles below Quincy, Illinois, on the east bank of the river and worked from there down. It is about 51 miles in length. When I left the levee to go on the bridge probably two-thirds of the first half of the work was done; the lower half had not been touched at that time. A little had been done on it when I went back to the levee, but the upper half had been finished. By being half done I mean that the levee was completed half way from the upper end on. In my judgment as an engineer the location of the work was a proper one. The country to be protected by the levee was generally the district that the river overflowed during every high water. Next to the river the land was more or less broken up by sloughs or channels entering from the river and then returning back into it.

One of these, the Sny Carte, was the channel which gave its name to the levee. The sloughs were separated by ridges, the higher of which were generally near the bank of the river. The problem was to select such a location for the levee line on the ridges next to the river, or between the sloughs adjacent to the river, as to protect the greatest amount of the low district between the river and the bluffs. Mr. Corthell had made a preliminary survey prior to the time the location was made. My instructions from Mr. Corthell were to locate the levee essentially on the line established by the preliminary survey unless I had exceptionally good reasons to change the location, but I was instructed to make such examinations as might be desirable, and Mr. Corthell himself was
409 *a* present with the location party from time to time and was aware of the way the work was being conducted. The survey was made in accordance with his desires. Several side lines were run during the location survey and some changes made from the preliminary survey based on these lines, but in general the location followed the preliminary survey. The lines of the preliminary survey were marked by stakes driven every hundred feet. Some of them had been lost but I found no difficulty in locating within a few feet of the preliminary survey all through the length of the levee. I began the last of August or the first of September, 1872. The problem of locating the levee was not an exceedingly difficult one, but required a good deal of study and judgment. The financial question was one which had to be considered. An effort was always made, also, to enclose as much of the cultivated land as possible. The principal cultivated land lay close to the Mississippi river and quite often the levee line was located through some of the very best fields the district contained. There was always a tendency on the part of the land owners to have the levee located so as to enclose as much as possible of their land. The height of the levee was fixed by Mr. Corthell in consultation with others and it was determined the levee should be built on the elevation of the high water mark of '51. There were recognized marks at Hannibal, Louisiana and Clarksville on the west side of the river, and at Quincy, Illinois, and Cincinnati Landing on the east side. Careful levels were run and checked and rechecked by our location party determining the slope of the river from the upper to the lower point, and it was found to be frequently six inches to the mile. The grade of the levee was established at Hannibal at the elevation of the '51 water mark and a slope was given to the levee corresponding to the continued high water slope of the river.
410 *a* In grading to complete the bank we allowed for the natural shrinkage of material which always takes place in earthen em-

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bankments. This allowance was generally fixed at one-tenth of a foot per foot. If the bank required to be nominally ten feet high in order to come up to the elevation of the '51 high water mark on certain ground it was built eleven feet high, allowing one foot for settlement. Sometimes it was varied in accordance with the material used. The general intention was that the top of the levee should stand at the '51 high water mark when the levee had been thoroughly settled. The average height of the levee was 8 feet and a fraction. The greatest fill was at the Big Cut-off, which was upwards of 25 or 30 feet. (Witness here produced a preliminary survey of the work and the same was offered in evidence marked "Parkhurst Exhibit A1 and A2.") The height of the levee was to be the high water mark of '51 except in a few important places where the bank was built one or two feet higher for safety and better protection. Mr. Corthell acted under the direction or control of a board of commissioners whose secretary was Mr. George W. Jones. They had no other superintendent than Mr. Corthell than I knew of. I recollect the location of the levee at the Rouse place which is referred to by Mr. Chamberlain in his testimony. I don't think the location was a dangerous one. It was one of those points I have referred to where it was important to inclose as much of the cultivated land as it was safe to do, within the levee. There was nothing essentially dangerous in the location of the line so close to the river that material could not be obtained from the river side of the levee to build or repair the levee and where the original borrow pits were taken almost entirely from the land side of the levee. The probable reason for it was that the ground was so much higher near the
411 *a* bank of the river that the levee could be built more cheaply than to locate it further away, and the location of the levee further away from the river would leave outside of the levee valuable land and would, and all things considered amount to considerable. The specifications required that while the borrow pits were made on the outside of the levee that divisions should be kept between them; the borrow pits should not be over 150 feet long, and that strips of unbroken ground should be at least 15 feet between them. The borrow pits were generally on cross section sheets that were platted in the office. I have here a copy of the specifications made by myself from the printed copy which I had and which I know to be one of the original specifications. (The specifications were here introduced in evidence and marked "Parkhurst Exhibit B.") On page 337, volume 3, of the evidence, Mr. Chamberlain refers to cases where quicksand ran out from underneath the levee on account of the excavation of borrow pits on

the inside. The general rule for work in these cases was to leave a wide berm on the inside of the levee. Where there was a slough that was crossed by the levee and the natural ground didn't furnish the berm one was filled in so that at such points the levee would be strengthened by filling outside of the established slopes. There were probably some cases where the pressure of the water outside might develop conditions of quicksand underneath the levee or in the borrow pits inside, but I don't think they were numerous nor could have been foreseen. The possibility of such things was considered and provided for both in the specifications and in the actual construction. There were sections of the district where it either had to be on the ridge between the sloughs or in the slough itself. Referring to his statement on page 339, if the levee had been located invariably so that all the material could have been
412 *a* borrowed on the outside to build it, the cost of the levee would have been at least 25 per cent above its actual cost and valuable land would necessarily have been left outside. In regard to the plane of high water Mr. Chamberlain is in a position to determine actually what effect all high waters have upon the levee; when the levee was constructed it was entirely a matter of judgment what the effect might be. It was the belief of the chief engineer that when the levee had been kept up for several years the river would be deepened and the sand bars removed so that the high water level would be actually diminished instead of increased, and upon his belief he based his determination to make no special allowance for the damming up of the water, and so making the high water plane higher than it otherwise would have been. The effect of the levee would be to deepen the channel of the river. Where the river is confined to a narrow channel it is invariably deeper than at other points. There were many engineers who disputed this theory, but it was pre-eminently advanced by Captain Eads, and upon this theory the jetties at the mouth of the Mississippi river were constructed. In my opinion his theory has proven to be the correct one. The burrowing of moles in the levee is one of the things to be watched for on all levees. The question of building the levee higher was one of policy which was covered by financial conditions entirely. As an engineering problem it was desirable to build it higher, financially it was thought to be entirely impracticable to do so. To have added two feet to the height of the levee would have increased its cost from 35 to 40 per cent. The addition of two feet to the height would really be the addition of that amount to the bottom as though the top was raised with the whole levee that much. The slopes of the levee are so flat
413 *a* that the quantity of material added is vastly more in propor-

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tion than the proportional height. The levee was not simply raised to the height of the high water of '51, but shrinkage was always provided for the smallest as well as the large fills. The work was generally done by means of horses dragging an iron scraper hauling a quarter or half a yard from the adjacent borrow pits to the embankment. This was dumped on the embankment and the team returned for additional material; this made frequently the travel of 50 or 75 feet over the levee with a pair of horses to each scraperful of material, and the effect was to pack the material pretty thoroughly during the construction. Stakes were set every hundred feet, the tops of which were measured to be at the proper elevation for the top of the levee, making allowance for shrinkage. The material was piled up until the levee had been built to the proper elevation and slopes as shown by the stakes, and the work was then checked by the assistant engineer in charge, who ran levels and set new stakes wherever an additional fill was necessary. When the work was finished as indicated by the stakes, if necessary check levels were again run over and the work reported finished. The contractor was obliged to keep this work in good condition as regards wash and waste until the acceptance of all the other work on the levee from the head down to this point. This rule was strictly observed on the portion of the levee falling under my observation. The effect of teaming along the top of the levee was to cut roads and then force material outside of these roads down the slopes. I have seen the levee since its construction and it has been used for teaming very largely. I think Mr. Chamberlain's statement that the Corthell grade above the Hannibal bridge would be some 4 or 5 feet below the actual mark of '51, and also below that mark at the Louisiana bridge, is entirely
414 *a* erroneous. He assumes that the construction of the levee at that point would dam up the river enough to make the water rise 4 or 5 feet, but any one familiar with the action of water in large streams like the Mississippi river would consider such a statement absurd, knowing the tremendous velocity of water such a dam would create and the ease with which the bottom of the river could be scoured out. It would be more reasonable to assume that this elevation would not exceed 12 to 15 inches. So far as I know the requirements of the specifications in regard to the cutting and grubbing of stumps and roots were never cancelled or countermanded and were carried out. There was a tendency among some of the sub-contractors to cheat in this respect, and they were carefully watched, but it is quite possible that they sometimes succeeded in cheating. The clearing and grubbing were generally done by totally different contractors from the par-

ties who made the levee embankment. It was generally the case that the clearing was done for many hundred feet in advance of the earthwork so that generally this cheating could be prevented. Sometimes the contractors did the clearing and then did the earthwork. The requirement of the specifications concerning a muck ditch was, I think, observed in all the work through the timber or brush land, also in the open prairie where there was a heavy sod. The intention was to cut off all chance of percolation of water through the base of the embankment by cutting out either roots or woody fiber of any kind. In cultivated ground the ditch was omitted, as in such places the earth was already loosened and all such roots and fibers removed. It was not necessary in such places. So far as I recollect the specifications concerning the breaking of the ground with a plow the whole width of the levee was done in all cases where it was necessary. Exceptions 415 *a* would be where the ground was already broken up or where sandy or free from vegetable growth. The object of the specifications was to assist in bonding the new material with the material of the base of the levee. The specifications required that the borrow pits should be discontinuous and separated by an unbroken piece of ground 15 feet wide. I know of no cases in which these rules were not carefully followed. The ridges between the outside borrow pits were visible a few years ago. The outlines of the berms were not so plainly seen owing to the filling and growth of shrubs. I was on the lower part of the levee 5 years ago from Louisiana to the lower end. The average height of Mr. Corthell's levee was 8.2 feet and the amount of the embankment 2,132,192 yards. Mr. Chamberlain says he added approximately 4 feet. Adding 4 feet to the original height would make the cross section 12.2 feet high. The average amount for a station of 100 feet for that height is 1604.1 cubic yards. The whole levee was 2,753 stations long. This would make a total of 4,416,100 cubic yards in a levee of the size proposed by Mr. Chamberlain. He says in his testimony that the number of cubic yards it would take to construct a levee of the height which he had adopted in his new system would be 3,783,987 yards, which differs from my estimate 630,000 cubic yards. Only a reasonable approximation could be made at this date by examination of the levee and the land about it of the work necessary to construct it. When I visited the lower part of the levee 5 years ago there were some pieces of land that were apparently as nearly wild land as they were when the levee was built. There had been some land cultivated. The use of sand bags, burlap, brush and straw mentioned by Mr. Chamberlain would, I think, help protect the levee. The levee was strong

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enough originally and only needed watching and care in re-
416 *a* pairing to make it effective against all but the most extreme high waters. Mr. Chamberlain speaks of the location of the levee 200 feet further east; I should say that that location would be not less than one foot lower than the actual location. A difference of six inches in the height would correspond to 240,000 cubic yards of filling on the whole length of the levee, and a foot would be nearly three times that much. I don't think the location of 200 feet east would have appreciably avoided the difficulties mentioned. The percolation of water which would give rise to any trouble would only take place where the natural surface of the ground was covered with water and it would then be through the levee embankment itself or through the ground on which the embankment was built. If the borrow pits had been made on the outside the water would have had access to the lower strata of material which would have been exactly the same as those now on the inside of the levee and which are the ones which seem to have made trouble in some places by developing quicksand. If trouble was caused in the present location the same causes would give rise to trouble in the suggested location more inland. As a matter of fact there are only a few places where a location exactly 200 feet inside the old one would have been feasible. I think the difference in height in the proposed change would have been an objection as the higher the levee is the more dangerous it becomes; but as the levee would have a wider base corresponding to the height the theoretical strength should be as great. It would not have been possible to locate the levee upon the line 200 feet east as Mr. Chamberlain suggests and make it parallel with the present levee on account of the sloughs and channels which cut up the ground
where the levee is located. I can recall at least half a dozen
417 *a* places where, if the levee was moved at all, it would have to be moved several hundred feet, perhaps a quarter of a mile. The sloughs which have been referred to are frequently deep channels having a depth of 2, 4 and 6 feet, perhaps even more below the surface of the ground. Sometimes the levee was located on a ridge between two such sloughs on the inside of the levee. I recollect one below Clarksville which was several hundred feet wide; to move the levee at all it would have to be moved across a slough on to some other ridge. There are other places of a similar nature at the Great Cut-Off, Crooked Slough, the head of the Sny and at the mouth of the Sny where the line had to be built across deep outlets. The choice of the location was very limited and I doubt if any different location from the one adopted could have been made with any satisfaction. There were a number of

places where a fair location could have been made 200 feet east of the present location with slight additional expense and the borrow pits might have been made on the outside. I don't think such a location would have been on the whole desirable. The land was lower, the cost of the work would have been greater and the parties at interest would have been dissatisfied. The quicksands were never perceptible, and they could not be in the nature of things; that is a condition which would develop after the levee was subjected to pressure or the ground beneath the levee had become saturated with water under pressure. The original contractors were Skelsey, Fuller & Pierce and they sublet the work to a great many different contractors. My understanding is that they failed and the bondsmen on their contract had to complete the work, which they did through their agent, J. P. Mansfield. (Parkhurst Exhibit C. offered in evidence.) About the date of this letter I made a final estimate for Mr. Mansfield. (Park-
418*a* hurst Exhibit D. offered in evidence.) This is the final estimate for final payment. I remained there at work until the commissioners took possession of the levee. I was in Louisiana, Missouri, the levee headquarters for the engineer's office for more than a year after that and never heard the commissioners make any complaint about the location or construction of the levee.

On cross-examination witness testified: I took charge of the work about September 1st, 1872. I had been in Hannibal about two years; I had been studying engineering and at work as an engineer two years before that in Providence, Rhode Island, graduated at Brown University, covering the engineering studies then given in the university, in 1868. I had not been at work at levee work; I didn't work at engineering for two years. This was my first experience in levee work. Since that time I have had no direct engineering experience in the same work. The only experience I ever had in connection with the construction of levees was my experience on the Sny levee work. I think I stated that the location of the levee was good but not that it was the best possible location. In my opinion no change could have been made to improve it, all things considered and bearing in mind the physical as well as the financial question. I don't see how it was possible to leave out the matter of cost in an estimate of the value of such a piece of work. An engineer is always called upon to do the best possible work at the least possible cost. The location as a means of protection alone might have possibly been varied if you didn't have to consider expenses. I think some changes might have been made to have made it a better and more perfect

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levee for the purpose of protection to lands inside if the expense item had not been of some importance. A different system of construction would have been an item to have considered first.

419 *a* One means of improving the levee would have been to construct the levee with a broader base, that is with flatter slopes and a wider tops. Raising the height of the levee would have been another. The use of riprap for protecting the levee where likely to be exposed to another would have been another. The use of sheet piling where there was danger of quicksand; the hauling of clay material from distant points where only a sandy material existed; a change of location in some places in order to get higher ground; the use of more expensive material in building the levee across such places as the head of King's Lake; all these would have been the means that would have been resorted to if expenses had not been considered. Undoubtedly the levee would have been relocated in a few places. Mr. Corthell ran a parallel line from the head of the levee to Hamburg Bay and the location was based on that. I was in charge under Mr. Corthell and made some changes in location. I remember one or two changes; they were not extensive. One in the neighborhood of Crooked Slough a half mile in length. The other assistant engineers were Messrs. Van Sant, Colton, Murphy, Shields and one or two others, I don't remember, employed at different times. In 1872 I was twenty-five years old. The assistants were generally younger than I, though one or two were older. In the location of the levee we did the best we could with the money at our disposal. I don't mean to say that it was the best possible location or the best possible levee. The levee was constructed to a height equal to the height of the '51 water, when it was settled. A levee equal to the height of a high water mark would not in my opinion protect land inside of it from water which reached to that mark. This levee was not a protective levee against the high water of '51. It was not expected to be.

420 *a* The location of the levee opposite of the city of Hannibal above the bridge is between the river and a slough. The location which Mr. Corthell preferred was some distance further east, really east of the slough. The location crossed the entrance to what is called Sand Slough north of the approach of Hannibal bridge; the levee was connected with that approach. The bridge approach to the Wabash railroad embankment formed part of the levee down to the slough trestle where the railroad crosses Sand Slough. In order to make the levee continuous this slough trestle had to be filled. The levee was then started from the railroad embankment adjacent to the slough and followed the bank of the slough for some distance south. Probably a better location

in some respects, but one costing more money would have been to locate the levee on the east bank of Sand Slough, and this Mr. Corthell preferred. It was generally understood that the levee was there located along the bank of the river for the purpose of taking in the Stillwell place. In making my estimate of the additional cost and the additional amount of earth necessary to increase the size of the levee I included the railroad embankments but the estimate was a comparative one, the other estimate I gave was also based on the same length so that for purposes of comparison the figures are correctly stated. My estimate included also the railroad embankments of the C., B. & Q. and the C. & A. railroads which form part of the levee. I think probably the construction of the levee opposite Hannibal above the bridge would have some effect in raising the water above the bridge; the only difference between me and Mr. Chamberlain is in the amount of water. He placed it at four or five feet and I place it at a foot or 18 inches. The statement which I have made with reference to the water above Hannibal bridge applies also to the water above the Louisiana bridge. The width of the right of way was two hundred feet.

I don't mean to say there were actually no stumps or logs 421 *a* left in the levee covered up with dirt, but only that there were none so far as I know. The levee was divided in stations over which a division engineer had charge, and he and his men were generally over that division from one end to the other every day, perhaps more than once in a day, and any cheating of that kind would be pretty generally discovered. The contractors could never tell when Mr. Corthell or myself would be along. We were visiting the work at frequent intervals and they could not take chances on that kind of thing or do a great deal of it. It is quite probable that some of it was done, I am not sure. I presume I have found contractors along the work filling in with brush, logs and stumps in the line of the levee and stopped them, but I can't recollect an instance now. I think it is possible I may have done so. I do not agree with Mr. Chamberlain in his statement that it would have been better had there been sufficient ground left on the river side of the levee to have made the borrow pits on that side. I don't think it is material whether the borrow pits are on the inside or outside so that sufficient berm is left on the inside. Generally I think there was sufficient berm left on the inside; if there was not it was an oversight on somebody's part. I have never been on the levee in times of exceedingly high water. When I left it there were no borrow pits on the inside of the levee near enough to be dangerous, but in 1883 when Mr. Chamberlain went on it there may have been a great many such places. The speci-

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fication provided for two distances; where a roadway was to be left the borrow pits were to be not less than 30 feet from the base of the levee, where no roadway was left 10 feet was the fixed distance. I think if the material was known to be quicksand the distance should be more than 10 feet. The difficulty during the construction of the work was to determine where there was any
422 *a* quicksand. It was not supposed there would be anything of the kind. We made the specifications upon the theory that there was no quicksand. I think the levee would have been a safe protective levee so far as any water that I know of as likely to have come, provided they had looked after it properly. The construction of the levee and the material in it warranted the belief that it was safe enough if properly looked after. That it might not be high enough to shut out the waters is something one can not tell anything about. If the waters in 1888 or '92 or either of them rose to the height of the water of '51, it is quite probable that it would have gone over the levee in places. They would have had a fighting chance to do something with the levee. It frequently happens in the south that the water comes over the top of the levees, and they keep the water from flooding the town by means of sand bags and things of that kind. If a levee 51 or 52 miles long were all threatened at the same time it would be impossible to do anything. There are many places on the line 200 feet east of the present line that I recollect distinctly. There are other places I don't recollect at all. There were many streams that entered from the river into the district and went back again into the river. These it was necessary to cross at both ends. I don't think the advance in the science of building levees since 1872 could be quite a radical one. I think the principal advance that has been made is not in the building of levees, but in the knowledge of the streams along which levees are built. If I were constructing the levee now I think I would locate it on the same place. If the question of expenses, however, were not to be considered the location and method of construction might be changed; but I mean to say that I would not change the location provided the usual conditions existed requiring the engineer to con-
423 *a* sider expense as well as other items. I think the items of expense and the desire of land owners to have as much land as possible within the levee are proper items to consider, and I took that into consideration in making my statement. A considerable portion of the levee was built on the sand. I have seen some of the breaks on the lower portion of the levee and have been told that they had a great deal of difficulty in getting material to stop them, but don't understand the trouble was that the convenient material

was sand. Some parts of the lower portion of the levee are in a sandy district. I known that the levee was completed throughout its length while I was connected with it according to the plans and specifications. I certainly made estimates and reports to that effect, but would not say from recollection of different points. I do not know that the commissioners refused to accept it as completed. I have no recollection that the canal inside the levee leading to Hamburg Bay was fully completed, but don't now recollect any deficiency in it.

My first estimate was made November 1st, 1872. There was done at that time 183,143.2 yards of earthwork and 101.43 acres of clearing. The second estimates was made December 1st, 1872, the total amount of earthwork was 382,809.6, the total clearing 185.04 acres; the last estimates includes also the previous month. The third estimate was made January 1st, 1873; the earthwork done during the previous month was 109,785 yards, the total 493,044.6; the clearing and grubbing during the month 86.23 acres, the total 271.22 acres. The fourth estimate was made February 1st, 1873; the earthwork for the month was 34,750 yards, total 527,594 yards; the clearing during the month 37.75 acres, total 309.2 acres. The next estimate was February 28th, 1873; the earthwork for the month 40,155 yards; total 567,749.6; clearing 27.50 acres, total 336.41 acres. The next estimate was 424 *a* made March 31st, 1873, the work for the month being 71,795 yards, total 641,644.6; clearing 45 acres, total 381.41 acres. The next estimate was made April 30, 1873, earthwork for the month 68,856, total 710,500.6; clearing 15 acres, total 396.41 acres. (Parkhurst Exhibit D was here offered in evidence.) In the work which I have just enumerated there might have been long hauling beyond the distance of 300 feet mentioned in the specifications for which the contractors would have been entitled to more than the regular contract rate. I think there was very little if any such work. I have a paper showing the sections completed and nearly completed in March, 1873. It is a statement of work showing the amount done and the amount required to finish the levee on March 1st, 1873, and is dated March 11th, 1873. The first five sections were then completed. The next eight sections more approximately completed and the work had been approximately half done for 11 more sections. There were 1,200 yards done on the 25th section. The sections began with number one at the head of the levee and were numbered down the levee consecutively, each section being approximately a mile in length. (The statement referred to by Mr. Parkhurst was offered in evidence

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and marked "Exhibit F.") The contractors were paid in bonds for their work. I made the estimates as to what the contractors were entitled to on the basis of taking the bonds at 90 cents of the face value. It is my understanding from parties at work on the levee that the men who were sureties or bondsmen for Skelsey, Fuller & Pierce took charge of the work and completed it after the failure of that firm. I know that John Heffron was related to the work; his name is familiar to me. He was continually referred to as active in the matter of bondsmen. J. P. Mansfield was man-
425 *a* ager of the work on the levee under the bondsmen of Skelsey, Fuller & Pierce. He was not manager so far as I knew for the original contractors. I think I left to go on the Louisiana bridge April 1st, 1873.

Redirect: The preliminary location of the levee was made before any contracts for construction were let but the actual location was made at the time the contract is dated. The contractors had nothing to do with fixing the location of the levee. Their contract was to build the levee on the line determined by the commissioners. During the year I remained at Louisiana and at other times I noticed that the top of the levee was used for wagon roads. I can not identify the fact that I saw it used as a wagon road during that year, but have no doubt it was. I made a trip to Hannibal over the levee during '76 or '78 and no portion of it was used as a wagon road at that time.

Specifications for Contracts of Sny Island Levee, marked "Parkhurst Exhibit B."

2215 United States of America.)
District of Massachusetts. } ss.
County of Berkshire.)

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Corthell.

Be it remembered that on this twelfth day of October, in the year of our Lord one thousand eight hundred and ninety-five, I, Frank H. Wright, a Notary Public, did call and cause to be and personally appear before me, at my office in the village of Great Barrington, in the said District of Massachusetts, in the County and State aforesaid, Elmer L. Corthell, to testify, and the truth to say, on the part and behalf of the complainants in a certain civil cause or matter of controversy, now depending and undetermined

in the Circuit Court of the United States for the Southern District of Illinois in Equity at Springfield, Illinois, wherein Michael W. O'Brien et al. are complainants and John G. Wheelock et al. are defendants. Deposition Elmer L. Cor

And the said Elmer L. Corthell, being above the age of twenty-one years, and having been by me first cautioned and sworn to testify the whole truth in the matter of controversy aforesaid, I did carefully examine the said witness, and he did thereupon depose, testify and say as follows, viz.:

Examined by Mr. Henry M. Duffield.

IN THE CIRCUIT COURT OF THE UNITED STATES OF THE STATE OF ILLINOIS IN EQUITY.

MICHAEL W. O'BRIEN ET AL., Complainants, versus JOHN G. WHEELOCK ET AL., Defendants. } Sny Levee Bond Case.

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Q. What is your name, age and occupation, and where do you reside? A. Elmer Lawrence Corthell; age, 55; occupation, civil engineer; residence, New York City; residing since April last in North Egremont, Mass.

Q. What is your profession? A. Civil engineer.

Q. How long have you been a civil engineer? Give resume of your experience. A. Since the spring of 1868. My education and experience as a civil engineer briefly stated are as follows: I was graduated from Brown University, Providence, R. I., in 1867 with the degree of Bachelor of Arts; in the following year received the degree of Master of Arts, and in 1894 the honorary degree of Doctor of Science, by the same university in recognition of services in this country and Mexico as a civil engineer and of contributions to engineering literature. I gave special attention during the college course of four years to mathematics, and immediately upon graduation entered into a general engineering office for practice

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in Providence, R. I., engaged on city, railroad and hydraulic works. After one year of work there I was called to Missouri on rail-
2217 road work and a brief epitome of the work since is as follows:

Assistant engineer construction Hannibal and Naples Railroad, 1868; division engineer location and construction Hannibal and Central Missouri Railroad, 1869; chief assistant engineer bridge over the Missouri River, Hannibal, Missouri, 1870-71; chief engineer construction Sny Island Levee, Illinois, 1871-75; chief engineer bridge over Missippi, Louisiana, Missouri, 1873-74; resident engineer jetties mouth Mississippi River 1875-80; engineer ship railway on Tehuantepec Isthmus, Mexico, 1880; chief engineer construction New York, West Shore and Buffalo Railroad, 1881-84; chief engineer Atlantic and Pacific Ship Railway, 1884-87; consulting and constructing engineer, with offices in Chicago and New York, 1887-90; building as chief engineer or consulting engineer the following works: Bridge over the Ohio River at Cairo; bridge over the Missouri River at Nebraska City and Sioux City; two bridges in Oregon; water works Bismarck, Dakota; bridge over the Mississippi at St. Louis; Elgin, Joliet and Eastern Railway; a belt line around Chicago; consulting engineer in 1889 of all railroads terminating in New Orleans to solve the problem of belt railroad, union depot and other terminal facilities; chief engineer Brazos River jetties, Texas, 1889; chief engineer jetties Tampico, Mexico, 1890-92; consulting engineer Illinois Central Railroad and Atchi-
son, Topeka and Santa Fe Railroad in Chicago, 1890-93;
2218 building railroads, bridges and other works in the city of Chicago; engineer park and railroad bridges, Chicago, 1892-93; chief engineer proposed bridge over the Mississippi at New Orleans; 1889 made examination of the proposed Coast Line Canal, Florida, St. Augustine to Biscayne Bay, 310 miles; 1891-92 concessionaire completion Tehuantepec Railroad and engineer to make plans for improvement of the harbors of that route; 1894, by request of the United States Senate Committee made examination and a statement before the Committee upon Harbor Improvements on the Coast of California. I have made a specialty during my entire engineering experience of river and harbor hydraulics. I have twice written the articles on Levees for Johnson's Encyclopedia since 1884; also on jetties, ship canals and ship railways, and have by experience, observation, examination in this country and foreign countries and by continual study, kept abreast of the times on all these important engineering subjects.

Q. Do you remember an improvement of the Mississippi River called the Sny Levee? A. Yes.

Q. What, if anything, did you have to do with it? A. I acted as chief engineer of the work from the beginning of the surveys in 1871 to the completion of the work in 1875, directing the examination, surveys and the construction of the work.

Q. Who located the site of the levee? A. I did.

Q. Under whose directions? A. Under the general direction of the Levee Commissioners, advising unofficially with
2219 Mr. Charles N. Clark, who was acting as an agent for the commissioners during the preliminary surveys.

Q. What did you do before beginning the location with a reference to preparing yourself to undertake the work? A. I made a very careful study of the subject of leveeing in this country and other countries, examining all of the accessible literature on the subject to ascertain the proper method of building such a work under the conditions that existed on the upper Mississippi in the locality of the work, with which conditions I was already familiar by experience on bridge work. I also went to the State of Mississippi and the State of Louisiana on the lower Mississippi River and examined there the character of the levees, also conferred with those who were experienced in such work and had charge of the same, and from these examinations and studies made the plans and the specifications which I judged would be best adapted to the work in hand.

Q. Have you read the testimony of Mr. Chamberlain, of which I sent you a copy some time in the summer? A. I have.

Q. Having general reference to that please state what determined in your opinion the proper line or route of the levee and whether in your opinion it was a good line and if so give any reply you may desire to Mr. Chamberlain's criticism on the route or line. A. There were several physical conditions which determined the location of the levee, the elevation of the ground, the proximity of the ridges, so-called, of which the entire coun-
2220 try near the river is composed, the fact whether the river bank was caving or making, these were the main physical conditions. In order to arrive at the best location the country for a considerable distance from the river was always carefully examined to ascertain whether there was ground better adapted for building the levee than other ground; the height of the various ridges was ascertained, the depth of the intervening low ground and sloughs and every possible physical condition was first carefully ascertained and from this the final location was made, which from my own intimate knowledge at the time and since then of the country was, all other conditions considered, the only location that would be considered a proper one. Generally on this river

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and on the lower Mississippi and on all rivers forming their banks of alluvium the lands next the river are invariably higher than those a short distance back from it, for the reason that the heavier particles of sediment in the flowing water are dropped on the nearest bank, the finer particles going to a greater distance and necessarily forming lower land. This is the case in almost every instance along the river in front of the Sny Island Levee and the height of the ground in the ridges back of the river ridge was more than 6 inches and often a foot less than that on the said river ridge. If there was an exception at any place and ground as high as the river ridge was found it was generally impracticable to get upon this ground by the location as it was generally separated from the high ground in front by an intervening slough. It is my
2221 opinion from intimate knowledge of the conditions of this nature existing the entire 52 miles that to have built the levee on ground in rear of its actual location would have cost a large amount of money in excess of its actual cost and would also have thrown outside of the levee a great deal of valuable land. Any stranger, even an experienced engineer, would hesitate twenty years or more after the construction of such a work to give an opinion as to the correctness of its location after all of the conditions nearly have been changed by the building of the work and by the general changes in the face of the ground by borrow pits, ditches, removal of timber, changes in sloughs and the still more important condition of having the river in front of it at a considerable height and the back country free from water and cultivated, fenced and generally improved.

One quite important change was made in the location considerably at variance with the preliminary line and contrary to my best judgment. The point referred to is opposite and above Hannibal. The preliminary line was run on the east side of Sand Slough, a considerable distance away from the river, crossing the Wabash Railroad east of the trestle work a short distance below the gravel road. The ground where this preliminary line was run was solid and high and well protected from the river, not only by its distance from it but by much intervening timber. The location was made over entirely different ground by the direction of Mr. Charles N. Clark, the agent of the Commissioners, in
2222 order, as he said, to prevent throwing outside the levee a large body of land. The location was finally made on much lower ground above the Hannibal bridge than that along the east side of Sand Slough, above described. One portion of the embankment of the Wabash Railroad was used and it was necessary to fill

the trestle work above mentioned. Nearly all the serious breaks which have occurred in this vicinity are in this stretch of line above the Hannibal bridge on the low ground mentioned and from the bridge to the trestle work above noted. One object which Mr. Clark had in view as stated to me in changing the line was to utilize over a mile of the embankment of the Wabash Railroad.

Q. State, if you please, who actually located the levee for work and upon what data. A. The location was made by Mr. H. W. Parkhurst, chief assistant engineer, under my direction, the preliminary line from which this location was made by Mr. Parkhurst was run the whole length of the levee from the high ground in Adams County, which the levee connected with to the lower end of the work at, or near, Hamburg Bay. This preliminary line was denoted by stakes placed 100 feet apart, or nearer at places and after the careful examinations had been made which are above stated. The location by Mr. Parkhurst generally conformed to this preliminary line, the only changes being detail ones required to improve the line at certain points and to run in the necessary curves to avoid the angles which were laid down on the pre-
2223 liminary line as is customary in such work. Even these detail changes were made under my general direction, I being present on the ground and having the general charge of the work during the entire location and approving it step by step.

Q. Please state as to height of the levee, what height of water in the river it was designed to protect and how you ascertained the level of that height and whether in your opinion the levee was constructed of sufficient height to be protective against that high water. A. Before establishing the height of the levee and the grade of the same, or its slope per mile, careful observations were made of various marks of the high waters of the Mississippi River and in different years. These marks were not only upon the bottom land where the levee was built, but also on the opposite side of the river, specially in towns like Hannibal, Louisiana, Clarksville and other old places, where more reliable records of the heights of high water could be obtained than in the wilder bottom lands. Every high water mark on both sides of the river that was considered reliable was found by diligent inquiry of the residents and located by the levels. From these many records a careful profile, or grade line, was established from the head of the levee to Hamburg Bay. In addition to this examination there was also one made to ascertain the height of the river in its overflow on the bottom land itself and along the line of the bluffs that border it on the east. The levels which connected and recorded these various high water marks in these several localities were run with

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2224 great care by very accurate instruments and the checks that were obtained upon this instrumental work showed that the entire line of levels both along the bluff and along the river was absolutely accurate with a very small margin only of error. The grade line thus established was used in making the calculations of the earth work according to the cross-sections that had been adopted, namely, generally a crown 5 feet wide, a slope on the river side of 3 to 1, that is 3 horizontally to 1 vertically, and 2 to 1 on the inside, the grade line, which I established during the running of the preliminary line and on which I based the calculations to ascertain the quantity of earth work in the levee, was 18 inches above the high water mark of 1851 and found by the above named observations and levels. The calculations for the work were carried along simultaneously with the progress of the preliminary line, but when the line had been carried as far as Scott's landing, or Gilgal, some little distance above the city of Louisiana, the earth work had assumed such large proportions by the calculations based on the line of 18 inches above the high water of 1851 that Mr. Charles N. Clark, who was acting at that time as the responsible agent of the commissioners, instructed me to lower the grade line of 18 inches for the reason as he said that if the grade line which I had adopted should be used the cost of the work would be so great that it would be impossible to carry it out or obtain means for its construction, and he stated that if he could not buy a coat he could buy a waist-coat, or words to that effect. Another point 2225 which was made by him at the time was that as the high water of 1851 was the highest known in the memory of man in this vicinity and that the next highest, that of 1858, was 2 ft. lower than that of 1851 it was right to take the chances of 1851 never occurring again. The grade line was therefore dropped 18 inches and the work was constructed on that basis. However, in order to build it so that it would be at that height when the material was finally settled in its permanent condition the embankment during the progress of the work was raised above this grade line of 1851 according to the height of the embankment at different places and also according to the character of the material that was put into it. I am convinced that the height allowed for this settlement was sufficient every where to maintain the levee at the full height of the grade line established. I am of the opinion that if the levee from the time of its completion had been fully maintained up to the height at which it was built and against ordinary wash and waste, and wear and tear, it would have protected the lands behind it against any water that did not rise higher in the river than 1 ft. below the water of 1851. From a long and actual experience in

the effect of the confined volume of water in the alluvial beds of the rivers I am decided in my opinion that if the Sny Island levee had been fully maintained both in its cross-section and in the height to which it was built from the time of its completion for the next few years the concentrated force of the river produced by the levee would have scoured its sandy bed, enlarged the cross-section
2226 of the main river channel and would have accomplished exactly what has been accomplished on the lower Mississippi in much harder material, namely, the lowering of the high water plane instead of raising it. It is a fact from my own observations that the river channel along the first upper 8 miles of the levee was deepened by the concentration of the flow by the levee and it is a well known fact that the obstructive sand bars which existed in this stretch of the river disappeared shortly after the construction of the levee.

Q. What have you to say as to Mr. Chamberlain's criticism about the borrowpits, contained on pages 351 and 352 of volume 3 of the testimony? A. Although the specifications required that the material should be taken from the outside without other instructions are given and although this is the proper side from which to take the material, yet, neither on the Sny Island levee, nor was it so considered, at the time at least, on the lower Mississippi any serious objection to removing material from the inside if the conditions made it impracticable to obtain it from the outside. The berms as maintained on both sides of the levee and the slopes of the borrowpit next the levee always formed a sufficiently wide base under any circumstances. There was no instance in my recollection where the material was taken from both sides of the levee or immediately adjacent to it.

Q. He also criticizes the construction of the levee in not using a muck ditch. What have you to say to that? A. The
2227 muck ditch alluded to in section 3 of the specifications was not generally used for the reason that it would have been, with the materials under the levee, a source of danger and certainly an injury to the work for this reason, that it was ascertained after construction commenced that the material was generally composed of a stratum of black soil, or loam of from 2 ft. to 4 ft. deep and that underneath that was a stratum generally of sand with no harder material for a great depth below the surface. To have cut through this firm black soil on top would have weakened the foundations of the levee and no doubt have broken it down under pressure of the water.

Q. As to the plowing of the ground before making the embankment which was required by the specifications, which Mr.

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Chamberlain says should have beeen done? A. This was a distinct requirement of the specifications and was carried out faithfully from the beginning to the end of the work. I not only know that from my own superintendence and observation of the work, but from instructions to and reports from my assistants, who had immediate charge of carrying out these specifications.

Q. How about the grubbing of stumps, which Mr. Chamberlain thinks in some instances was not done? A. According to my judgment from examination of similar works it was my opinion that in the dense forest, through which the levee was to be built, it was unnecessary and impracticable to grub out the stumps over the entire base width of the embankment, which was on the average about 50 ft. and therefore I formed the specification requiring that over a space of 15 ft., measured from the
2228 outside slope stakes towards the center line of the levee all stumps and large roots should be grubbed to a depth of at least 1 ft. below the surface of the ground and this specification was rigidly adhered to and insisted upon by myself and my assistants during the entire work and over its entire length.

Q. On page 467 and following Mr. Dodge testifies as to not making the muck ditch after the ground had frozen and also as to leaving stumps. Will you look at that testimony and state what you recollect concerning it? After testimony has been read to the witness he says: A. The muck ditch as already stated was dug where in the judgment of the engineer it was thought necessary and best to do so and it was not abandoned, according to the testimony of Mr. Dodge, at any point on account of difficulties in the way of frost or any other kind that the contractor had to contend against. As to the stumps, the specifications above referred to were carried out strictly. The opportunity of having the work done according to specifications was a very good one in this respect for the reason that the principal contractors let the clearing and grubbing generally to one set of sub-contractors and the embankment to others and it was almost always the case that the former were able to clear ground and prepare the base a long way ahead of the grading contractor, so that if the clearing of the ground was not properly done, as observed by myself or my assistants in our inspection of the work, we called the clearing and grubbing contractors to account and had them go back over their work and do it according to the specifications. It was
2229 a feature of the work which was very carefully attended to by the engineers.

Q. Referring to the testimony of Mr. Lewis, page 492, as to the depth of the borrowpits, what have you to say? A. There was

no requirement of the specifications and there were no instructions limiting the depth of borrowpits providing the required slopes next the levee were maintained, and in my opinion there was no objection to any depth that was made according to my recollection of these borrowpits.

Q. So far as your knowledge and personal observation goes how did the contractors and sub-contractors perform their work in reference to the specifications? A. According to my personal knowledge and recollection there was no instance during the entire work where anything was done or left undone contrary to the spirit and letter of the specifications. If there had been the work would certainly have been opened up and performed again by the requirement of myself or my assistants.

Q. Will you please attach to your testimony a copy of the contract between the commissioners and the contractors, Skelsey, Fuller & Pierce? A. I have a copy of this contract before me and I will attach it to the testimony.

Q. Who began this work under this contract? A. Skelsey, Fuller & Pierce.

Q. How long did they work? A. Until August 27th, 1874, as shown by the copy of the estimate which I have before me.

Q. When did Mr. Mansfield, representing the bondholders, 2230 begin? A. From August 27th, 1874.

Q. During this period were estimates made monthly and furnished by you as called for by the contract reserving 10 per cent.? A. Yes.

Q. Was any final estimate made as called for by the contract? A. Yes. On May 26th, 1875.

Q. Will you please attach copy of estimate to your deposition? A. I have this estimate before me and I will attach it to the testimony.

Q. How long were you connected with the levee after it was completed as representing the commissioners? A. Until about the 1st of July, 1875, as I then went to the mouth of the Mississippi river to engage on the construction of the jetties.

Q. What in your opinion was the cause of the breaks in the levee? A. I have no opinion from actual knowledge as I was not in that part of the country, but from general information my opinion is that it was caused by lack of proper care and inattention to the maintenance of the work.

ched to ion of L. Corthell.

2231 Copy of the contract for the construction of the Sny Island levee.

This contract made and entered into this twenty-seventh (27th) day of August, A. D. 1872, by and between Edward Skelsey, Eben W. Fuller, R. Parker Pierce and Joseph Skelsey, doing business under the firm name of Skelsey, Fuller & Pierce, party of the first part; and William Dustin, John G. Wheelock and George W. Jones, or their successors in office (the Sny Island Levee Commissioners), appointed by the County Court of Pike county, Illinois, under and by virtue of "An Act to provide for the construction and protection of drains, ditches and levees and other work," approved 24th of April, 1871, to construct or cause to be constructed a levee along the banks of the Mississippi river, from a point in the southern part of Adams county, through Pike county, to a point in Calhoun county, all in the State of Illinois, party of the second part

Witnesseth, That said party of the first part for and in consideration of the promises of said levee commissioners, hereinafter set forth, agree to construct and furnish the proposed levee of the commissioners in accordance with the general specifications now on file in the County Court of Pike county, Illinois, with instructions from time to time of the chief engineer of said levee commissioners, and to his entire satisfaction and approval.

The said levee is to be located according to the above general description by the chief engineer of said levee commissioners, and shall be divided into sections of such length as he shall deem best.

2232 The work is to be commenced "bona fide" within thirty days from the date of this contract, and is to be prosecuted with diligence and dispatch, that the said levee may be completed in good order on or before the twenty-seventh (27th) day of August, A. D. 1874.

For and in consideration of the work in the premises, the said levee commissioners agree to pay said party of the first part as follows: Nineteen (19) cents per cubic yard for earth work, and fifty (50) dollars per acre for clearing and grubbing:

The work to be paid for in the bonds issued by said levee commissioners, at a valuation of ninety per cent. of their par value; payments to be made on or before the tenth day of each month.

Such monthly payments to begin after the first payment is made, according to the conditions included in the bond attached to this contract, and to be made on estimates furnished by the chief engineer of the said levee commissioners, reserving, however, ten (10) per cent. of each monthly estimate from each monthly payment, until the final and satisfactory completion of the work in this contract. When a final estimate will be made by the chief engineer which shall be conclusive to the parties to this contract and upon the making of such final estimate the balance appearing due to said party of the first part shall be paid.

It is still further agreed that if said levee commissioners shall be delayed by legal process, or prevented from want of means from prosecuting the work, or if high water in the river shall oper-
2233 ate to hinder or delay the completion of said work by said party of the first part, such delay or hindrance shall not give said party of the first part any claim to damages against said levee commissioners, but shall entitle said party of the first part to such an extension of the time herein stipulated for the completion of the work as will in the opinion of the chief engineer of said levee commissioners compensate for such delay or hindrance, it being understood that any delay caused by high water is not to entitle the party of the first part to an extension of the time herein stipulated for completing the work in this contract, unless such high water shall continue for more than a period of three consecutive months.

And it is further agreed that if, in the progress of the work, the chief engineer of said levee commissioners shall decide that said party of the first part is not performing all the terms of this contract, to be performed by said party of the first part, in manner and in form and in time mentioned in this contract, or in case said chief engineer shall decide that said work is not progressing with sufficient dispatch to insure its completion within the time herein stipulated, the said levee commissioners shall have power to annul this contract, by giving notice in writing to said party of the first part that the contract is annulled, and therefrom this contract shall cease and determine, unless said party of the first part shall expedite the work with reasonable dispatch and fulfill the terms of this clause as to the engineer's decision within ten days after the written notice aforesaid.

2234 The unpaid part of the value of the work done shall be forfeited by said party of the first part and shall become the prop-

erty of said levee commissioners, as liquidated damages, sustained by them on account of said forfeiture and failure, and said levee commissioners shall have power to employ any one else in the place and stead of said party of the first part.

And it is further agreed, that it shall be a condition of any and all sub-contracts made, that the sub-contractor or sub-contractors may at any time be dismissed from the work by the chief engineer, if the work performed by him or them is not satisfactory in progress and quality to the chief engineer of said levee commissioners.

It is hereby agreed between the parties to this contract that said levee commissioners may require evidence from time to time of the payment of all bills for labor and material used by said party of the first part, for which said levee commissioners may be made liable by law, before payment can be demanded by said party of the first part from said levee commissioners.

It is expressly understood by and between the parties to this contract that all work on which estimates have been made and paid as aforesaid shall thereafter be the property of said levee commissioners, and subject only to the lien of said party of the first part for possession for the purpose of doing the remainder of the work, if any needed thereon, and the further lien of said party to secure such amount of money as may thereafter become due from the drawback of ten per cent, as above mentioned or from any other cause.

2235 And it is further agreed that the said party of the first part shall perform its work wherever the chief engineer of said levee commissioners shall direct, and if said chief engineer shall instruct the said party of the first part to work in any one or more designated places, and with any designated force, and said party of the first part shall neglect to carry out such instructions the said levee commissioners through their chief engineer shall give a written notice to said party of the first part to commence the work with the designated force and if the said party of the first part shall not commence the work within ten days from the giving of said written notice the said levee commissioners may put the requisite force upon the work and charge the expense of the same to the said party of the first part.

It is further agreed by the said party of the first part, that, when work is progressing in or near inclosed fields or grounds of other parties, fences, bars and gates shall be kept up and all

possible care taken to protect crops, wood, stock or other property belonging to a third party, and the said first party shall be responsible for all damages occasioned by their neglect or that of their sub-contractors or employes in the premises.

Contract attached Deposit Elmer L. Cert

It is further agreed that if any owner, agent or occupant of any land on which any part of said levee is to be constructed shall wish to construct such part of said levee he shall be allowed to do so by both the parties to this contract and he shall be subject only to the instructions from the said levee commissioners by their chief engineer.

2236 It is further agreed, that in case of any disagreement or difference of opinion between the parties hereto, as to the true intent and meaning of this contract or any part of it the matter shall be referred to the chief engineer of said levee commissioners and his opinion shall be binding on all the parties to this contract.

In testimony whereof said levee commissioners have caused these presents to be signed by their chairman and their seal to be affixed and each member of the party of the first part has signed his name thereto.

Sny Island Levee Dist Commission

The Sny Island Levee Commissioners,
(signed) by William Justin, their Chairman. [seal.]
Skelsey, Fuller & Pierce.
Signed,

EDWARD SKELSEY, [Seal.]
E. W. FULLER, [Seal.]
R. PARKER PIERCE, [Seal]
JOSEPH SKELSEY, [Seal.]

COPY.

Copy of Final Estimate.

2237 Final estimate of work on the Sny Island Levee by J. P. Mansfield, contractor.

Earth work, 746,242.5 cu. yds., at 22½,	$167,904.56
Clearing and grubbing 280.72 acres at $50,	14,036.00
Total estimate, May 26th, 1875,	$181,940.56
Amt. in bonds at 90 cts.,	$202,156.18

Final Estimate. Amt. of approximate monthly estimates, 175,045.58

Amt. due in bonds, $ 27,110.60

Engineers' Office, Louisiana, Mo., May 26th, 1875.

Signed,

E. L. CORTHELL, Chf. Engr.
Per H. W. Parkhurst, Chf. Asst. Engr.

2238

United States of America,
District of Massachusetts,
County of Berkshire.

Estimate. I, Frank H. Wright, a Notary Public, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named and that he resides more than one hundred miles from the place of trial of said cause.

I further certify that a notification of the time and place of taking the said deposition was made out and served on the defendants to be present at the taking of the depositions and to put interrogatories if they might think fit as appears by the affidavit of service hereto attached.

I further certify that on the twelfth day of October, 1895, I was attended by Henry M. Duffield, who appeared for complainants, and no one appeared for the defendants, and by the witness who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by Alice Elma Corthell reduced to writing in the presence of the witness, and after carefully reading the same to the witness he subscribed the same in my presence, on the twenty-second day of October, 1895.

And I do further certify, that I am not of counsel, nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and nota-
2239 rial seal, this twenty-second day of October, in the year of our

Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth. Certificate

(Seal.) FRANK H. WRIGHT,
Notary Public, Berkshire County, Massachusetts.

(Indorsed.)
Filed October 31, 1895.
JAMES T. JONES, Clerk.

Letter to J. F. Mansfield, dated Louisiana, Missouri, May 20th, 1875, signed by E. L. Corthell, marked "Parkhurst Exhibit C." Exhibits and Statements

Tabulated Statement of Embankment and Excavation Figures of J. P. Mansfield Contracts on Sny Levee, and Final General Estimate of Work on Sny Levee, May 24th, 1875, marked "Parkhurst Exhibit D."

A statement showing the Progress on the Sny Island Levee from the beginning of the Work up to April 30th, 1873, prepared from monthly statements marked "Parkhurst Exhibit E."

Copy of Statement of Work on Sny Island Levee showing Amounts done and Amounts Required to Finish the Levee on March 1st, 1873, marked "Exhibit F."

426 *a* MICHAEL W. O'BRIEN.

Deposition taken at Detroit, Michigan, before Anna M. Griffin, a notary public for Wayne County, State of Michigan.

Michael W. O'Brien testified as follows: I reside in the city of Detroit and have resided there 25 years. Was acquainted with Francis Palms during his lifetime and had business relations with him. We organized the People's Savings Bank and had daily meetings with each other on that business. I am one of the trustees under his will. I had a personal knowledge of the purchase by Mr. Palms of the Sny levee bonds. Some of Mr. Palms' checks passed through my hands for them and he was in consultation with me about it before he purchased. He obtained the opinion of several western lawyers with relation to the validity of the bonds. He sent Colonel Atkinson to Springfield and I think he went to the county seat of the county where the work was located to obtain the details pertaining to the issue of the bonds and for the purpose of learning as to the validity of the bonds. He came back with a report of the details pertaining to the organiza- Deposition of Michael W. O'Brien

ion of W. O'Brien

tion and the issuing of bonds and presented an opinion in favor of their validity which was submitted to George V. N. Lathrop and by him approved before Mr. Palms really invested. The first delivery of bonds was for $100,000. He purchased three or four successive amounts afterwards. He made the first purchase from Mr. John Heffron, who was the party interested here who had the bonds. I think he bought all the bonds of or through Heffron. Negotiations were made here by Mr. Heffron and Mr. Wm. Foxen. It was a cash purchase. The bonds mentioned are part of the bonds described in the bill, but there are some bonds outside that were never presented. I think the price paid varied. The first lot of bonds was purchased at ten per cent. discount and the amount of the purchase $200,000. The second purchase was on the same basis, as well as I recollect. Mr. Palms continued to hold the bonds up to the time of his death. After his death I qualified as one of his executors and trustees and found the bonds. The first maturing coupons and part of the second were paid, none of the principal has been paid.

427 *a*

On cross-examination witness testified: At the time Mr. Palms was negotiating for these bonds we were in daily intercourse. I had no interest in the purchase myself. He told me what he was doing in the way of securing the bonds and the purchase of them. I suggested to him that he had better have an investigation made as to the legality of the bonds by some attorney. Before that we had the opinion of Judge Trumbull of Illinois. Mr. Palms never told me of any opinion rendered by Judge Skinner of Quincy. I saw some of the opinions, they are printed in our part of the record. They are all the opinions I know of as having been taken in connection with the case. The first issue was bought by Mr. Palms at the price of 90 cents on the dollar. I think the first arrangement included very much of the purchase and that subsequent purchases were made at the same price. John Heffron and William Foxen were residents of the city of Detroit. They purported to represent the contractors. I heard that they were sureties on the bonds given by the contractors Skelsey, Fuller & Pierce, but don't know it of my own knowledge. I know of no bonds being purchased at a lower price than 90 cents. I think Mr. Palms at the time of the negotiations had the same kind of information that I had concerning Mr. Heffron and Mr. Foxen.

FRANCIS F. PALMS.

Testimony of Francis F. Palms

Testified as follows: I am 58 years of age, reside in Detroit
428 *a* and am a trustee of the estate of Francis Palms, deceased. Francis Palms was my father. He died in 1886. He had no serious illness previous to his final sickness. He attended to business regularly until a day or two before his death. During the last year or so he was not able to go away from the city—to travel much; that was the character of his illness. He was born in 1810. Mr. O'Brien was his principal adviser and I came to Detroit in 1880. He attended to his business before that time and up to the time of his death. As near as possible, the date of his sickness was two years before his death. He was a man of very extensive business of a diversified nature. At the time of the purchase I was not a resident of Detroit and have no knowledge of the matter.

On cross-examination witness testified: My father died November 24th, 1886, and the morning before his death he was in his office. Up to that time he supervised his own business entirely. Mr. O'Brien was his confidential adviser and friend. His legal adviser was Mr. F. E. Driggs. For a year or so before his death my father was not able to leave the city, but transacted business up to the day before his death.

GEORGE W. JONES, Recalled.

Testimony of Geo. W. Jones —Recalled.

Witness is shown a copy of the contract between Messrs. Skelsey, Fuller & Pierce and the levee commissioners, also two bonds executed by said contractors and their sureties to said commissioners. I knew of such original contract but do not know where it now is nor where it can be found, and make the statement as to the bond in evidence. Witness examines the same and states, "I could not undertake to state definitely that they are absolutely copies of the original contract and bond, but would say in a general way that they are copies as I now remember. I cannot
429 *a* say that they are positively literal copies, but will say they are substantial copies to the best of my recollection." Said contract is marked exhibit "AB" and its material parts are as follows:

CONTRACT OF SKELSEY, FULLER & PIERCE.

Abstract of Skelsey, Fuller & Pierce.

Contract dated August 27th, 1872, between Edward Skelsey, E. W. Fuller, R. Parker Pierce and Joseph Skelsey, doing business under the firm name of Skelsey, Fuller & Pierce, of the first part, and William Dustin, John G. Wheelock and George W. Jones, or their successors in office (The Sny Island Levee Commissioners) appointed by the County Court of Pike county, Illinois, under and by virtue of "An act to provide for the construction of drains, ditches and levees and other works," approved April 14, 1871, to construct or cause to be constructed a levee along the bank of the Mississippi river from a point in the southern part of Adams county through Pike county to a point in Calhoun county, all in the state of Illinois—party of the second part.

Witnesseth, That said party of the first part for and in consideration of the promises of said levee commissioners, hereafter set forth, agree to construct and finish the proposed levee of the commissioners in accordance with the general specifications now on file in the county court of Pike county, Illinois, and with instructions from time to time of the chief engineers of said levee commissioners, and to his entire satisfaction and approval.

The said levee is to be located according to the above general description by the chief engineer of said levee commissioners, and shall be divided into sections of such length as he shall deem best.

The work is to be commenced bona fide, within thirty days from the date of this contract, and is to be prosecuted with
430 *a* diligence and dispatch, that the said levee may be completed in good order on or before the twenty-seventh day of August, A. D., 1874.

For and in consideration of the work in the promises, the said levee commissioners agree to pay said party of the first part as follows: Nineteen (19) cents per cubic yard, for earthwork; and fifty (50) dollars per acre for cleaning and grubbing; the work to be paid for in the bonds issued by said levee commissioners, at a valuation of ninety per cent. of their par value; payments to be made on or before the tenth day of each month; such monthly payments to begin after the first payment is made, according to the conditions included in the bond attached to this contract, and

to be made on estimates furnished by the chief engineer of said levee commissioners, reserving, however, ten (10) per cent. of each monthly estimate from each monthly payment until the final and satisfactory completion of the work under this contract, when a final estimate will be made by the chief engineer, which shall be conclusive to the parties to this contract, and upon the making of such final estimate the balance appearing due to said party of the first part shall be paid.

This section provides that if the work is delayed by legal process, want of means or high water in the river, the party of the first part shall not claim damages against such commissioners, but shall be entitled to a proportionate extension of time for the completion of the work.

This section provides that if said work is not progressing with sufficient dispatch to insure its completion within the time stipulated, said commissioners shall have power to annul this contract by giving notice in writing to said party of the first part, 431 *a* and thereupon this contract shall determine, unless said party shall expedite the work with reasonable dispatch within ten days after notice, and in case of such forfeiture of the contract the unpaid part of the value of the work shall be forfeited by said first party.

This clause provides for dismissing sub-contractors if the work is not satisfactory to the engineer-in-chief.

This clause stipulates that the second parties may require evidence from the first parties from time to time of the payment of all bills for labor and material used by said party of the first part, for which said second parties may be made liable.

It is expressly understood by and between the parties to this contract that all work on which estimates have been made and paid as aforesaid shall thereafter be the property of said levee commissioners, and subject only to the lien of said party of the first part for possession for the purpose of doing the remainder of the work, if any needed thereon, and the further lien of said party to procure such amount of money as may thereafter become due from the drawback of ten per cent. above mentioned, or from any other cause.

of Fuller

This clause provides that the first party shall perform its work wherever the chief engineer directs, and on failure after ten days notice other parties may be employed to do it.

This clause provides that when work is progressing near enclosed fields all possible care shall be taken to protect crops.

This clause provides that any owner of land through whose premises said levee is constructed shall be allowed to construct such part if he desires.

This clause provides that differences or disagreement between the parties shall be referred to the chief engineer.

432 *a* Signed "The Sny Island Levee Commissioners, by William Dustin, their chairman."

["Seal of Commissioners."]

SKELSEY, FULLER & PIERCE.
EDWARD SKELSEY, [Seal.]
E. W. FULLER, [Seal.]
R. PARKER PIERCE, [Seal.]
JOSEPH SKELSEY, [Seal.]

Bond of contractor, Ex. "C. D."

Bond of John Heffron, William Foxen, Patrick Fitzsimmons, Edward Reidy, John Atkinson, Merrill J. Mills, and William A. Moore, of Detroit, Michigan, to William Dustin, John G. Wheelock and George W. Jones, commissioners, etc., in the penal sum of Fifty ($50,000) thousand dollars.

Fuller Pierce.

Bond recites the above contract of Skelsey, Fuller & Pierce; also a bond dated August 21, 1872, executed by Edward Skelsey and others to said Dustin and others for the sum of fifty thousand dollars, that said commissioners ask further security and guarantee of compliance with the conditions of said bond as a condition precedent to granting a contract for the work referred to in said condition and in said contract. And for the purpose of giving security in addition to that contained in said bond of August 27, 1872, "We do hereby covenant, stipulate and agree in the penal sum aforesaid that all the conditions of the bond aforesaid

be executed and performed as required thereby, and that the work therein referred to be done and performed by said Skelsey, Fuller & Pierce, shall be done and performed as required by the contract and specifications referred to in said bond. Bond of Skelsey, &c.

Dated September 4, 1872.

433 *a* Signed and sealed by parties first above named.

Bond of Edward Skelsey, Ebenezer W. Fuller, R. Parker Pierce and Joseph Skelsey, doing business in the firm name of Skelsey, Fuller & Pierce, as principals, and John Heffron, William Foxen, Patrick Fitzsimmons, Edward Reidy, and John Atkinson, of Detroit, as sureties, to William Dustin and others, as commissioners appointed by the County Court of Pike county, Illinois, under and by virtue of an act of "An act to provide for the construction and protection of drains, ditches and levees and other works," approved April 24, 1871, to make, or cause to be made, a certain work described in the petition of John Morris and others, being the Sny Island Levee, etc., or their successors in office, in the penal sum of fifty thousand dollars.

The condition of the bond is that, whereas, the above bound obligors have this day been awarded a contract to build the said levee according to the plans and specifications of Elmer L. Corthell, chief engineer, etc., and that the said obligors shall well and truly fulfill said contract, and the work shall be commenced within thirty days from date of this bond.

Dated August 27, 1872, and signed and sealed by parties first above named.

List of documents, etc., offered by complainants, to be marked by the Master in case of O'Brien, et al. vs. Wheelock, et al. List of Documents offered by Complainants

Original petition to Pike County County Court.
Copy of record of proceedings of Pike County County Court.
Record of additional assessment.
Copy of assessment.
Judgment record of Pike County.
434 *a* Nine abstracts of title in Pike County.
Abstracts of title of lands in Adams County.
Abstract of title of lands in Calhoun County.
Intervening petition of Amos J. Stillwell.

List of files in the original cause. (Rec. p. 2.)
Copy of answer in Palms vs. Wheelock.
No. 5357, list of papers in original suit.
List of papers in Francis Palms vs. John G. Wheelock et al. (Original suit.)
Bill of complaint with record of additional assessment filed May 4, 1878.
Chancery subpœna filed June 8, 1878.
Demurrer filed September 21, 1878.
Amendments to bill and copy of trust deed filed March 13, 1879.
Answer to defendants filed March 13, 1879.
Draft of decree filed March 13, 1879.
Application to the Master to fix day for taking evidence and for acceptance filed March 27, 1880.
Notice to defendants and their solicitors filed June 18, 1880.
Notice to defendants' attorneys filed June 18, 1880.
Notice filed June 18, 1880.
Petition to become parties complainant filed June 18, 1880.
Order admitting parties complainant filed June 22, 1880.
Exceptions to Master's report filed June 30, 1880.
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Branham, F. H	1633	1639
Barton, Wm. T	1641	1645

Fusselman, Phillip	1647	1650
Milburn, J. H	1653	1657
Roberts, John O	1659	1665
Long, George P	1671	1673
Boyd, John W	1674	1677
Bates, Daniel E	1682	1684
Donohoe, S. T	1685	1687
Price, Charles G	1690	1692
Hamlin, A. G	1694	
Elliott, W. B	1697	1702
Hamlin, A. G., recalled	1706	1708
Galloway, A. L	1712	1719
Lovell, A. J	1725	1731
Reed, Charles W	1735	1738
Tanner, William	1744	1746
Stolte, Joseph J	1748	1750
Abram, Mathew R	1751	1753
Talbot, Mrs. E. H	1755	1759
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Gunnseth, John F	1769	1771
Stewart, Cyrus	1774	1776
Smith, John W	1779	1781
Shewe, Solomon	1781	1786
Epker, Fred	1788	1792
Edmund, O. J	1793	1797
Pristly, George P	1798	1801
Sapp, Mrs. Mary E	1802	1808
Edwards, O. J., recalled	1812	1814
Smith, Mrs. Henrietta	1815	1818
Rankin, Chas. H	1822	1830
Mackey, Silas W	1834	1835
Titsworth, Franklin	1836	1838
Tryon, Geo	1840	1842
Shaw, Charles	1843	1847
Gay, J. C	1849	1852
Shaw, Charles R., recalled	1855	1856
Rankin, Charles H., recalled	1857	1861
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Waid, Lyman	1866	1868

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Robers, E. A.....	1879	1883	
Allen, Albert L.....	1885	1887	
Dowd, J. L.....	1889	1892	
Brammel, John H.....	1894	1909	
Wheelock, John H.....	1914	1918	
Voige, Louis	1920	1922	
Hardin, Etta	1924	1925	

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Name of Witness.	Direct-examination.	Cross-examination.
Hardin, N. C.....	1926	1927
White, W. F.....	1929	1931
Dickson, Norman	1932	1936
Barton, Isaac	1939	1941
Robb, Chas.....	1943	1947
Seymour, Charles W.....	1950	1954
Stark, William H.....	1957	1960
Seymour, Chas. W., recalled..	1962	
Pryor, William	1963	1966
Gay, Jas. C. recalled.....	1968	1974
Close, Norton H.....	1978	
Ware, A. L.....	1979	1981
Gose, C. B.....	1983	1985
Gose, A. A.....	1986	
Beacom, Wm., recalled.....	1987	1991
Murray, R. M.....	1992	1994
Robb, Chas. P.....	1998	2000
Brammell, J. W.....	2007	2010
Ward, Thomas J.....	2011	2013
Myers, Samuel	2013	2014
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Hughs, S. E., recalled.....	2036	
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Shinn, A.	2044	

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Name of Witness.	Direct-examination.	Cross-examination
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Roodhouse, T. W.....	2097	2098
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1*b* SNY ISLAND LEVEE BONDS. Sny Island Levee B

STATE OF ILLINOIS.

Act of Legislature, April 24, 1871; and Amendatory Act to Register Bonds, April 9, 1872.

REGISTERED TEN PER CENT. BONDS.

Interest, July 1, Annually.

Interest and Principal Payable at the Agency of the State of Illinois in New York, or at the Office of the State Treasurer at Springfield, Ill.

PAMPHLET "A" SHOWN MR. JONES.
PIERCE & BROWER,
Financial Agents,
93 Madison Street, Opposite Tribune Building, Chicago.

FOR SALE BY BANKERS GENERALLY.

2*b* SNY ISLAND LEVEE BONDS.

STATE OF ILLINOIS.

Act of Legislature, April 24, 1871; and Amendatory Act to Register Bonds, April 9, 1872.

REGISTERED TEN PER CENT. BONDS.

Interest, July 1, Annually.

Interest and Principal Payable at the Agency of the State of Illinois in New York, or at the Office of the State Treasurer at Springfield, Ill.

PIERCE & BROWER,
Financial Agents,
93 Madison Street, Opposite Tribune Building, Chicago.

3 *b* SNY ISLAND LEVEE REGISTERED BONDS.

These bonds are issued by virtue of an act of legislature for the construction and maintenance of a levee along the Mississippi river in the counties of Adams, Pike, and Calhoun, of the State of Illinois. This levee commences at a point nine miles south of the city of Quincy, and extends southward along the river bank fifty-one and one-tenth miles, reclaiming to the property-owners of that locality one hundred thousand acres of the finest land in the state; a large portion of which is under high state of cultivation. The average value at present of the lands to be reclaimed by this levee is ten dollars per acre, and upon completion of the improvement said lands will undoubtedly be worth from fifty to seventy-five dollars per acre.

The act of the general assembly of the State of Illinois under which these bonds are issued relates to "Drains and Levees," approved April 24, 1871; and amendatory act "To provide for the registration of drainage and levee bonds, and secure the payment of same," approved April 9, 1872.

The commissioners appointed under provision of said act have fully complied with its requirements; are empowered to borrow the money necessary for the construction of this improvement, and are authorized to secure the payment of the same by notes or bonds, registered in the office of the auditor of public accounts for the State of Illinois, at a rate of interest not exceeding ten per centum per annum, and which shall constitute a lien upon all lands reclaimed for the repayment of the principal and interest thereof.

Sny Island Levee Bonds

These bonds are of a series of $500,000.00, to be issued by the Sny Island Levee Commissioners, under the authority and for
4*b* the purpose above stated; they bear ten per cent. interest, and are payable in twenty years.

The State of Illinois is custodian of all moneys collected for the construction of said improvement, and will apply same to the payment of accrued interest and the ultimate redemption of the bonds. The state, at the expiration of ten years, to commence the liquidation of these bonds at the rate of $50,000.00 each and every year thereafter until the entire issue is redeemed.

The interest and principal payable at the agency of the State of Illinois in New York City, or at the office of the state treasurer at Springfield, Illinois. Coupons payable annually on the first day of July, as above stated.

These registered bonds are unquestionably among the safest and best interest-paying securities now offered capitalists and others holding funds for investment. They are undoubted security.

5*b* LEGAL OPINION OF HON. LEONARD SWETT.

(Higgins, Swett & Quigg, Chicago, Ill.)

Chicago, Ill., December 6, 1872.

Messrs. Skelsey, Fuller & Pierce.

Legal Opinion of Hon. Leonard Swett.

Gentlemen: I have examined your Sny Island Levee Bonds, in reference to their validity, and the provisions of the law under which they were issued.

The acts of the legislature, approved April 24, 1871, and April 9, 1872, in substance provide, that the owners or occupants of lands requiring drainage or levees, for sanitary and agricultural purposes, may petition the county court, whereupon notice of such petition shall be given to persons whose lands may be affected, and at a hearing any person interested may contest the expediency of the work. After the hearing, if the court shall adjudge the work of public utility, commissioners to oversee and prosecute it shall be appointed.

Opinion Leonard Swett.

These commissioners are required to make a full examination in reference to the proposed improvement, the cost of the work, the damages and benefits occasioned thereby, and also to make maps and plans of the same, and report to the court which appointed them. Notice of the filing of this report shall be given to the land owners. Any persons whose interests may be injuriously affected, can again appear and contest the same, asking for such modifications or changes as they may deem advisable and just. After this report shall have been finally approved by the court, a jury is impaneled, whose duty it shall be to examine, personally, in reference to the improvement proposed, and estimate the damages and benefits which shall accrue to each tract of land affected thereby, and the proportion of such benefits to be assessed against such tracts as its share of the expense of the work.

After this assessment shall have been completed, a notice is published and mailed to each known owner of the land in reference to which damages or benefits have been assessed, fixing a time not less than ten days thereafter at which all parties dissatisfied may appear and make known their objections to the assessment.,

After hearing the objections, if any are made, and making such
6 *b* alterations as may be considered proper, a report is returned into court, where parties may again contest the assessment. If the report is confirmed, it may be spread upon the records of the court, and becomes a lien upon the various tracts of land for the amounts assessed against them.

After final confirmation, the assessment rolls are recorded in the recorder's office of the county in which the lands are situated, which record is a notice of the lien thereof to all persons.

The amount thus fixed, and attaching to each piece of land, is by the court made payable in installments, as may be required, and carried out in the assessment list, and thereafter collected annually, with the taxes, by the proper county authorities. The fund for the work being thus provided, the commissioners are authorized to borrow money and issue bonds therefor, within the means provided for their payment by the aforesaid assessments, and these bonds may be registered by the state auditor.

At the time of registration, the commissioners are required to file, with the auditor, a copy of the assessment rolls, showing a list

of the lands to which the lien has attached, the amount of each assessment, the aggregate amount, and thereafter such assessments are extended by the auditor, and collected the same as other state taxes. Legal Opi of Hon. L

Under these provisions no assessments can be entered upon the county records until the amount for which each tract is liable shall have been fixed by a jury confirmed by the court and recorded in the county records. And no bonds can be registered until the county records, showing the amount of the funds provided, and that the bonds are within that amount, shall have been certified to the auditor.

Your bonds having been registered, such registry is evidence that the law has been complied with, and the lien has attached. Henceforth, under the terms of the law, the interest and principal will be collected the same as other state taxes, and will be paid by the auditor, at Springfield or New York, the same as other state indebtedness.

I am of the opinion that your bonds are valid, and constitute a legal lien upon the lands benefited by the levee to the amount of the assessment made thereon.

Yours truly,

(Signed.) LEONARD SWETT.

7*b* CERTIFICATE OF COMMISSIONERS.

Messrs. Skelsey, Fuller & Pierce, Chicago, Ill.:

The undersigned, commissioners appointed by the county court of Pike County and State of Illinois, of which Hon. R. M. Atkinson is judge, to oversee and prosecute the improvement known as the Sny Island Levee, hereby certify that the island sought to be reclaimed, with the contiguous bottom lands, embrace a little more than one hundred thousand acres of land. The island is formed by the main current of the Mississippi upon the west side, and the Sny Cartee slough passing upon the east of it. At high water the Sny falls from the Mississippi and overflows the island and the adjacent portions of the main land. At low water it receives no flow from the Mississippi, and the supply of water is from small streams from the bluffs. The island and lands to be inclosed by levee is fifty-one miles in length, and, with the adjacent bottom lands, from four and one-half to six miles wide. Certificate Commissio

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ioners

The improvement is a levee fifty-one and two-tenths miles in length, which cuts off the flow of water from the Mississippi into the Sny Cartee slough, and protects the island from overflow from the river. This island at present is traversed by the Toledo, Wabash and Western, the Quincy, Alton and St. Louis, and the west branch of the Chicago, Alton and St. Louis railroads.

The number of acres to be redeemed by the improvement is a little more than one hundred thousand. We consider that without any levee this land is worth from three to thirty dollars per acre; and when the levee is completed it will be worth from twenty to seventy-five dollars per acre—averaging about forty dollars per acre on the whole territory.

There is no opposition to the improvement; but, on the contrary, it is unanimously demanded by the owners of the land. Twenty miles of the levee is already completed, embracing the crossing of the Sny where it leaves the Mississippi at the upper point; and the upper bottoms are reclaimed. Only eighty-eight thousand dollars of bonds have been issued and paid upon the work. The whole of the assessment is five hundred thousand dollars, and the bonds will be issued only as the work progresses, and are paid upon the relative estimates of the chief engineer as the work progresses; and ten per cent. is kept back to insure the performance of the work by the contractors.

(Signed) WILLIAM DUSTIN,
GEORGE W. JONES,
JOHN G. WHEELOCK,
Pittsfield, Ill., December 14, 1872. Levee Commissioners.

8*b* CERTIFICATE OF HON. RICHARD M. ATKINSON.

Judge County Court, Pike County, Ill.

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chard
kinson.

This is to certify that I am judge of the county court of Pike County, Illinois.

Proceedings were instituted and prosecuted to their final termination in said court for the construction of the Sny Island Levee. Messrs. John G. Wheelock, of Adams County, and William Dustin and George W. Jones, of Pike County, were appointed commissioners under the drainage acts, approved April 24, 1871, and

April 9, 1872; they accepted, were qualified, entered upon and are still exercising the duties of said office. Certificate Hon Ric M. Atkin

The object of said Levee is to redeem from overflow about one hundred thousand acres of land, known as the Sny Island and the adjacent bottom lands.

The assessments made to constitute a fund to prosecute the work were made by a jury of twelve persons appointed by my court, and all the requirements of said drainage acts were carefully complied with.

The following is a brief summary of the proceedings had in this matter:

August 21, 1871—Petition filed by owners of lands.

September 18, 1871—Proof made of publication and posting notices. Prayer of petition granted, and John G. Wheelock, William Dustin and George W. Jones appointed commissioners.

September 23, 1871—Commissioners filed acceptance and official oath.

November 22, 1871—Commissioners file their report, and also that of their engineer, and continued for notice, etc.

December 18, 1871—Proof of publication and posting notices made. Report confirmed and jury ordered.

May 15, 1872—Summons ordered for jury of twelve.

May 22, 1872—Jury impaneled.

July 22, 1872—Assessment of jury filed, and continued to await appeals.

September 25, 1872—Assessment of jury confirmed, and ordered to be paid in ten annual installments, commencing in 1882.

October 23, 1872—Order entered authorizing the commissioners to borrow money and issue bonds.

I will further add, that, so far as I have been able to observe, there has been no hostility on the part of the owners of the 96 lands to this improvement, but on the contrary they have afforded every degree of encouragement to the commissioners.

(Signed) RICHARD M. ATKINSON,
Judge County Court.

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nty Court.

CERTIFICATE OF COUNTY COURT.

Adams County, Ill.

State of Illinois, } ss.
Adams County, }

I, George Brophy, clerk of the circuit court, and ex-officio recorder in and for said county, do hereby certify that the special assessments made in the county of Adams aforesaid on account of the Sny Island Levee, as shown by a tabular statement of the same, which statement is certified to by the hand and seal of the clerk of the county court of Pike County, in the State of Illinois, and filed the 16th day of December, A. D., 1872, in the recorder's office of said Adams county embraces the amount of four thousand, one hundred and sixty-one 1-100 (4,161 01-100) acres of lands, situated in said County of Adams, and that the total assessments on the same, as therein shown, amounts to the sum of twenty-three thousand and sixty-seven 42-100 dollars ($23,067.42).

Witness my hand and official seal this 19th day of December, A. D. 1872.

(Signed) GEORGE BROPHY, Clerk.
By CHAS. A. KENDALL, Deputy.

Seal of
Circuit Court,
Adams Co.,
Ill.

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tificate of
unty Clerk.

CERTIFICATE OF COUNTY CLERK.

Pike County, Ill.

State of Illinois, } ss.
County of Pike. }

This is to certify that the special assessment made in the County of Pike on account of the Sny Island Levee embraces, and, under the law and the proceedings of the county court of said Pike County, constitutes a lien upon eighty-nine thousand one hundred and sixty-eight 1-100 (89,168 1-100) acres, of land 10*b* in said county, and that the assessment in said county for benefits against said lands amounts in the aggregate to the

sum of four hundred and fifty-nine thousand two hundred and fifty-two and 01-100 dollars ($459,252.01). This assessment is payable as follows, as appears from the records in my office: in ten equal payments—one-tenth in the year 1882, and one-tenth each year thereafter, and each bearing ten per centum interest, which is assessed and to be paid annually, and collected as the law directs.

Certificate County C

I, William B. Grimes, clerk of the county court in and for Pike County, certify the foregoing to be true. Given under my hand and the seal of said county court, this 21st day of December, A. D. 1872.

(Signed) W. B. GRIMES,
County Clerk.

Seal of
County Court,
Pike Co.,
Ill.

CERTIFICATE OF COUNTY CLERK.

Certificate County C

Calhoun County, Ill.

State of Illinois, Calhoun County, } ss.

This is to certify that the special assesment made in the County of Calhoun on account of the Sny Island Levee embraces and constitutes a lien upon seven thousand six hundred and ninety 54-100 acres of land in said Calhoun County, as appears from certified copy of assessment roll filed in my office, and that the assessment in said county for benefits to said lands amounts in the aggregate to the sum of twelve thousand seven hundred and seventy-one dollars ($12,771.00), as appears from said assessment roll.

Given under my hand and the seal of the county court of said Calhoun County hereto affixed, at my office in Hardin, this 18th day of December, A. D. 1872.

(Signed) JOHN F. NOLTE,
Clerk.

Seal of
County Court,
Calhoun Co.,
Ill.

11 *b*

DRAINAGE AND LEVEE LAW.

An Act to Provide for the Construction and Protection of Drains, Ditches, Levees, and other Works.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That whenever one or more owners or occupants of land shall desire to construct a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter.

Sec. 2. Such petition having been filed, as provided in the preceding section, the petitioners shall cause at least two weeks' notice to be given, by posting notices in at least three of the most public places in each congressional township through which the drain or drains, ditch or ditches, levee or other work, is or are proposed to be constructed, or if the same shall not be inhabited, in the nearest inhabited township, and by publishing a copy thereof in some newspaper published in the county in which the petition is filed, at least once in each week for two successive weeks, or if no newspaper is published in such county, then in the nearest newspaper published in the state. Such notice shall state when and in what court the petition is filed, the starting point, route and terminus of the proposed drain or drains, ditch or ditches, or levees, and if a levee or other work is intended to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition.

Sec. 3. The county court in which such petition shall be filed, may hear the petition at any probate or law term thereof, and may determine all matters pertaining thereto under this act, and
12 *b* may adjourn the hearing from time to time, or continue the case for the want of sufficient notice or other good cause.

Sec. 4. In case the drain or drains, ditch or ditches, levee or other work proposed to be constructed, shall pass through or over, or be constructed upon lands lying in different counties, the petition may be filed in the county court of either of such counties. Drainage Levee

Sec. 5. On the hearing of any petition filed under the provisions of this chapter, all parties through or upon whose land any of the proposed work may be constructed, or whose land may be damaged or benefited thereby, may appear and contest the necessity or utility of the proposed work, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto. If it shall appear to the court that the proposed drain or drains, ditch or ditches, levee or other work is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby for agricultural and sanitary purposes, the court shall so find, and appoint three competent persons as commissioners to lay out and construct such proposed work. In case the lands to be drained shall be situated in different counties, not more than two of the commissioners shall be chosen from any one of such counties. If the court shall find against the petitioners, the petition shall be dismissed at the cost of the petitioners.

Sec. 6. Before entering upon the duties of their office, such commissioners shall take and subscribe an oath faithfully to discharge the duties of their office without favor or partiality, and to render a true account of their doings to the court by which they were appointed, whenever required by law or by the order of the court.

Sec. 7. They shall elect one of their number chairman, and may elect one of their number or some other person as secretary.

Sec. 8. A majority of the commissioners shall constitute a quorum, and a concurrence of a majority of their number in any matter within their duties shall be sufficient.

Sec. 9. As soon as may be after their appointment or within such time as the court may direct, the commissioners shall examine the land of the petitioners proposed to be drained, and the lands over or upon which the work is proposed to be constructed, and inquire and determine:

1. Whether the starting point, route and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all

respects proper or most feasible, and if not, what is or are so. 13 *b* 2. The probable cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor.

3. What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work.

4. What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding.

Sec. 10. If the commissioners shall find that such costs and expenses are more than equal to the benefits there will be bestowed upon the land to be benefited, they shall so report, and the proceeding shall be dismissed at the cost of the petitioners.

Sec. 11. If the commissioners shall find that the proposed work or such portion of the same as will be satisfactory to the petitioners, can be done at a cost and expense not exceeding such benefits, they shall proceed to have the proper surveys, profiles, plans, and specifications thereof made, and shall report their conclusions and a copy of such surveys, profiles, plans, and specifications to the court which appointed them.

Sec. 12. The commissioners shall not be confined to the point of commencement, route or terminus of the drains or ditches, or to the number, extent or size of the same, or the location, plan or extent of any levee or other work to that proposed by the petitioners, but shall locate, design, lay out and plan the same in such manner as they shall think will drain the petitioners' land with the least damage, and greatest benefit of all lands to be affected thereby, and any plans proposed by such commissioners, may, on the application of any person interested, or of the commissioners, be altered upon the order of the court, in such manner as shall appear to the court to be just.

Sec. 13. Upon the report of the commissioners being filed with the clerk of the court appointing such commissioners, they shall cause notice to be given in the same manner as is provided in section two of this chapter, which notice shall state the time of

filing such report, and upon what day application will be made for the confirmation of such report, at which time all persons interested may appear and contest the confirmation thereof, or that the same ought to be modified in any particular, and may offer any competent evidence in support thereof.

Sec. 14. If, upon the hearing, the court shall be of opinion that the objections are not well taken, or if no objections shall be made, it shall order the confirmation thereof. If it shall appear that the same ought to be modified, and the court shall be 14*b* sufficiently informed in the premises, it shall modify the same to conform to the equities in the premises; or if not sufficiently informed, it shall order the commissioners to review and correct their report and may make specific directions in what respect they shall reform their report. And the court may make all necessary orders in the premises, either for the continuance of the hearing, or other lawful purpose.

Sec. 15. If the report is referred back to the commissioners for amendment, the court may fix a day when the commissioners shall again present their report, in which case the hearing shall stand adjourned to that day, and no further notice shall be required thereof. If no day shall be fixed for such report, the cause shall be continued to the next term of court, when it shall stand for hearing.

Sec. 16. When the report of the commissioners shall be confirmed, the court may impanel a jury of twelve men competent to serve as jurors, who shall be sworn to faithfully and impartially perform the duties required of them to the best of their understanding and judgment, and to make their assessment of damages and benefits according to law; or the court may direct that a jury be impaneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners may apply to any justice of the peace in the county, who shall immediately, without the formality of any written application, proceed to summons and impanel a jury of six men competent to serve as jurors, who shall be sworn in the same manner as is above provided in case of a jury impaneled by the court in which the proceeding is pending, and the justice shall enter upon his docket a minute of such proceeding before him and the names of the jurors.

Sec. 17. In either case the jurors shall elect one of their number as foreman, and shall proceed to examine the land to be affected by the proposed work, and ascertain to the best of their ability

and judgment the damages and benefits which will be sustained by, or will accrue to, the land so affected by the construction of the proposed work, and shall make out an assessment roll, in which shall be set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as shall be most convenient, the number of acres in each tract, and if damages are allowed, the amount of the same, and if benefits are assessed, the amount of the same, and in case damages are allowed to, and benefits assessed against, the same tract of land, the balance, if any, shall be carried forward to a separate column for damages or benefits as the case may be.

Sec. 18. In making such assessment the jury shall award and assess the damages and benefits in favor of and against each tract separately, in the proportion in which such tract of land will 15 *b* be damaged or benefited; and in no case shall any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it will be benefited by the proposed work, according to the best judgment of the jury.

Sec. 19. Whenever it shall appear to the jury that a drain, ditch, levee or other work has been, in whole or in part, constructed for the purpose of draining any land to be affected by the work proposed under this chapter, and such work shall be found to be of benefit to such lands, and any of the lands to be benefited have borne any part of the expense of such work, either pursuant to an assessment or otherwise, the jury may allow to the owner of such land, and deduct from the assessment which they may make against the same the amount of the expense of such work so borne by such lands, or such part thereof as will make an equality of burdens and benefits as between the several owners of lands benefited. (See also Sec. 100.)

Sec. 20. When the jury shall have completed their assessment of damages and benefits, they shall fix a time and place when and where they will attend, in case the jury was impaneled by the court in which the petition is filed, before some justice of the peace in the county where some part of the land affected is situated, or if the jury was impaneled by a justice of the peace, before the same justice for the correction of their assessment; and the commissioners or the jury shall give at least ten days' notice of such time and place, by posting notices, as required in section two of this chapter, and by causing a copy of such notice to be sent by mail, addressed to each owner or occupant of land allowed for damages or

assessed for benefits, whose name and residence is known to the commissioners. The affidavit of any credible person that he deposited such notice in the post-office, addressed to the owner or occupant named, at his place of residence, postage paid, shall be sufficient evidence of the sending of such copy of notice pursuant to this section. Drainage a Levee L

Sec. 21. The jury shall appear at the time and place appointed, and shall hear all objections that may then and there be made by the owners or occupants of any lands which may be allowed damages or assessed for benefits, or by the commissioners, to the allowance of damages to or assessment of benefits against any tract of land, and shall make such corrections as shall seem to them just, and shall adjust such assessment so as to make the same just and equitable.

Sec. 22. At such hearing the justice of the peace shall preside, and may compel the attendance of witnesses and enforce order in the same manner as in other cases before justices of the peace; and in case any juror impaneled shall fail to appear, may attach him for contempt, or may impanel another in his stead, and may at any time during the proceedings, in making or considering their assessment, impanel jurors in the place of any who shall refuse or fail to act, and administer to such jurors the oath required by section sixteen of this chapter.

Sec. 23. If no objection shall be made to the assessment at the time and place so appointed to hear objections, or when found correct, or corrected upon the hearing, the jury shall confirm such assessment, which shall be certified by the foreman of the jury and delivered to the commissioners, who shall return the same to the next term of the court in which the petition shall have been filed, and the same shall stand for hearing at that term, or may, for good cause, be continued.

Sec. 24. The commissioners, or any person who shall have made objections to such assessment, may appeal from the finding of the jury to the court in which the assessment is returned, by giving notice of his or their intention to take such appeal, within ten days after such confirmation by the jury, and filing with the clerk of such court his or their bond, payable to the opposite party, with such security and in such an amount as shall be approved by the clerk, conditioned to pay all costs that may accrue by reason of such appeal; and if the appeal is by an owner or occupant of land assessed for benefits, to pay such an amount as shall be found

against him on account of benefits to his land by reason of such work.

Sec. 25. The trial upon appeal may be in the same manner as upon other appeals from justices of the peace, and in case the assessment of damages or benefits shall be changed from that returned to the court, the court shall cause the assessment roll to be amended to conform thereto.

Sec. 26. When the assessment roll shall have been corrected as aforesaid, or in case no correction shall be required to be made, the court shall confirm the same and cause it to be spread upon the records, and appeal or writ of error shall be allowed therefrom.

Sec. 27. At the time of confirming such assessment, it shall be competent for the court to order the assessment of benefits to be paid in installments of such amounts and at such times as will be convenient for the accomplishment of the proposed work, otherwise the whole amount of such assessment shall be payable immediately upon such confirmation, and shall be a lien upon the lands assessed until paid.

Sec. 28. Immediately after the entry of such confirmation by 17 *b* the court, the clerk shall make out and certify to the commissioners a copy of such assessment roll, and shall also make out, and deliver to the commissioners, separate copies of the same, pertaining to the lands situated in different counties, which shall be recorded in the recorder's office of the respective counties in which the lands are situated, and shall be notice of the lien thereof to all persons.

Sec. 29. The commissioners, upon receiving such certified copy of such assessment, may proceed to collect the same, or any installment thereof, or they may certify such assessment, or any installment thereof which they may be entitled to collect at the time, to the county clerk of the county in which the lands assessed may be situated, who shall extend the same, in a separate column, upon the proper tax books for the collection of state and county taxes, and such assessment or installment thereof so extended, shall be collected and enforced in the same manner as state and county taxes: Provided, the owner, agent or occupant of any land through or on which any drain, ditch or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the value thereof upon his assessment.

Sec. 30. In case the assessment for benefits shall be payable in installments, such installments shall draw interest at the rate of ten per centum per annum from the time they shall become payable till they are paid and such interest may be collected and enforced as part of the assessment. Drainage Levee

Sec. 31. When the commissioners shall have elected to collect any assessment or installment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or installment shall be due and uncollected, and as often as any installment shall become due and be uncollected at the time for making return of the tax books for the collection of state and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any installment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of state and county taxes in the counties or respective counties where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amount so collected to the commissioner(s).

Sec. 32. If three months shall not intervene between the 188 time of the delivery of an assessment warrant to the commissioners, or the falling due of the last of several installments upon any such warrant, and the time for making return of tax books for the collection of state and county taxes in that year, the commissioners may make their return at or before the time for making such returns in the succeeding year.

Sec. 33. The commissioners appointed by virtue of this chapter, shall not collect or receive any money for the purposes therein specified, until they shall have given bond, payable to the people of the state of Illinois, for the use of all persons interested, in a sum not less than twice the amount of the assessment for benefits payable in any one year, with such security as shall be approved by the judge of the court, conditioned for the faithful application of all moneys that may be received by them as such commissioners and to make due account thereof to the court whenever required, which bond shall be filed in the court in which the proceedings are had. The court may require additional bond from time to time.

Sec. 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be

necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee, or other work for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and side drains, and may employ all necessary agents and servants, and enter into all necessary contracts, and sue and be sued.

Sec. 35. The commissioners may borrow money, not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof.

Sec. 36. When it shall appear that a drain, ditch, levee or other work has been, in whole or in part, constructed for the purposes of draining any land to be benefited by the construction of any work which they shall be authorized to construct, and the whole or any part of the cost of such work shall have been paid or incurred by any person or corporation, if such work shall be valuable for the purposes of draining the land, and can be made useful therefor by such commissioners, according to their 19*b* plans, they may allow and pay to such person or corporation the actual value thereof, for such purpose. (See also Sec. 83.)

Sec. 37. All damages over and above the benefits to any tract of land, shall be payable out of the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same.

Sec. 38. The court may at any time remove any commissioner appointed by it, and appoint another in his place, and may fill all vacancies by death, resignation, removal or otherwise, and may appoint a new commission, or authorize the commissioners ap-

pointed, to repair or cleanse any work, ditch or drain that shall have been constructed. Drainage Levee Law

Sec. 39. Any one or more new assessments may be made in the manner herein before provided, on the suggestion of the commissioners, or any owner or occupant of lands affected by any work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, protect or maintain any drain, ditch, levee or other work constructed by virtue of this chapter.

Sec. 40. The commissioners shall receive for their services the sum of three dollars per day for each day they shall be actually engaged in the business of their appointment. They shall fix the compensation of all other servants and agents.

Sec. 41. The commissioners shall, as often as once in each year after their appointment, and as much oftener as the court shall require, make a report to the court by which they were appointed, showing the amount of money by them collected, and the amount and kind of work done, and the manner in which the same is being done.

Sec. 42. When the cost of any proposed drain, ditch, levee or other work authorized by this chapter to be done, will not exceed the sum of five thousand dollars, and will not extend through or into more than three congressional townships, the petition may, if the petitioners shall so elect, be filed with a justice of the peace in the county where the land to be affected, or the major part thereof, is situated; and all the proceedings authorized by this chapter to be had in the county court, in cases where the petition is filed in such court, may be had before such justice of the peace, and the assessment of damages and benefits shall be conducted before such justice in the same manner, as near as may be, as in cases commenced by petition before such county court, and appeals may be taken from the final judgment of the justice of the peace to the county court, within the same time and in the same manner as appeals may be taken from the findings of the jury in cases commenced in the county court. And the assessment of benefits may be collected and enforced as in such cases before the county court.

Sec. 43. When the proceedings shall be had before a justice of the peace, the justice shall direct the commissioners of highways of the town or township, or in case the drain, ditch or other work shall be located in several towns or townships, the com-

missioners of the several townships, as a joint board, to lay out and construct such work, and perform the duties required of commissioners appointed under this chapter; and such commissioners of highways shall have all the power and authority, and may perform all acts and discharge all the duties bestowed upon or required of commissioners appointed by the county court.

Sec. 44. If any commissioner of highways shall refuse or neglect to discharge any of the duties imposed upon him by virtue of this chapter, he shall, for every such refusal or neglect, be liable to any party aggrieved for all damages sustained by him, and upon conviction may be fined in any sum not exceeding one hundred dollars, and be removed from his office.

Sec. 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy, or in any manner impair the usefulness of any drain, ditch or other work constructed under this chapter, or that may have been heretofore constructed, for the purposes of drainage or protection against overflow, may be fined in any sum not exceeding two hundred dollars, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the state of Illinois, and all fines when collected shall be paid over to the proper commissioners, to be used for the work so injured.

Sec. 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying or impairing the usefulness of any such drain, ditch, levee or other work, shall be liable to the commissioners having charge thereof, for all damages occasioned to such work, and to the owners and occupants of lands for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction.

21 *b*

Approved April 24, 1872.

22 *b*

REGISTRATION OF DRAINAGE AND LEVEE BONDS.

An Act to Provide for the Registration of Drainage and Levee Bonds, and Secure the Payment of the Same.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, Whenever it shall appear by the finding of the court before which any proceeding is pending or may be had, pursuant to the provisions of an act entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," approved April twenty-fourth, eighteen hundred and seventy-one, that any drain, ditch, levee or other work authorized by said act to be made, will be of public benefit for the promotion of the public health, or in reclaiming or draining lands, the same shall be deemed a public work, and the control thereof shall be subject to such other and further enactments as may hereafter be provided.

Sec. 2. Whenever the commissioners appointed to lay out and construct, or construct or repair or improve any such drain, ditch, levee or other work shall be authorized by order of the court to borrow money, and shall issue bonds as provided in section thirty-five of said act, in the aggregate amount of not less than twenty-five thousand dollars, it shall be lawful for the commissioners to register such bonds at the office of the auditor of public accounts. Such registration shall show the date, amount, number, maturity and rate of interest of such bonds, and the auditor shall, under his seal of office, certify upon each bond the fact of such registration.

Sec. 3. At the same time that the bonds are registered by the auditor, the commissioners shall file with the auditor a copy of the assessment roll, and shall also file with the respective county clerks of the counties in which the land assessed is situated, a copy of so much of the same as lies within their counties respectively, and thereafter the assessment upon such property shall be extended and collected in the manner provided in section twenty-nine of said act, and shall not be collected by the commissioners.

Sec. 4. It shall be the duty of the auditor, annually, before the time of settlement of county collectors for state taxes, to make out and forward to the several county collectors of the coun-

ation of ge and Bonds.

23 *b* ties in which the assessed land may be situated, a statement of the amount of the assessment collectable in that year that may be required to pay the interest upon such bonds for that year, and to insure the payment of the principal of such bonds out of such assessment; and upon the collection of the installments upon such assessment the county collectors shall pay into the state treasury the amount so certified, to the credit of said commissioners, which shall be held and paid out by the state treasurer, as hereinafter provided.

Sec. 5. The state shall be deemed the custodian only, of the amounts so paid over to the state treasurer, and shall not be deemed in any manner liable on account of any such bonds; but the amount so collected and paid into the state treasury shall be applied in the payment of the interest and principal of such registered bonds; and if any balance remains after the payment of such bonds, the balance shall be paid over to such commissioners.

Sec. 6. In case an amount shall be paid into the state treasury in any year, more than shall be sufficient to pay the interest and principal that shall fall due in that year, the treasurer shall invest the same in interest-bearing bonds of the United States or of this state, or in the purchase of such registered bonds, and accumulate such or so much thereof as shall not be required to pay interest and principal of such bonds or be invested in the purchase of such bonds, until the whole amount of such registered bonds shall be paid.

Sec. 7. All laws relating to the payment of interest on the state debt, or the cancellation of evidence thereof, not inconsistent with this act, shall apply to the receipt, custody and disbursement of the amount collected and paid into the state treasury under this act.

Sec. 8. Upon the payment of such registered bonds, or interest coupons, by the commissioners issuing the same, and the presentation thereof to the auditor, he shall cause the entry thereof to be made in his office.

Approved April 9, 1872. In force July 1, 1872.

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24 *b*

f E. L. , Chief gineer.

REPORT OF E. L. CORTHELL, CHIEF ENGINEER.

George W. Jones, Esq.,
Secretary Sny Island Levee Commissioners,
Pittsfield, Ill.

Dear Sir: In compliance with instructions from you I have

to make the following report in reference to the Sny Island Levee: Report of E. Corthell, Ch Engine

The construction of levees to prevent overflow is comparatively a new work in this section of the country. In some parts of the world four thousand years will not reach back to the date of their incipiency, and since the year 1717 levees have largely absorbed the attention of the dwellers along the lower Mississippi, who inhabit twenty-five million acres of alluvial lands.

The question of most vital importance for us to consider is, what conditions do science and experience teach to be necessary to successful leveeing?

1st. As to the general features of the country to be reclaimed, a natural or artificial drainage is demanded. With a pocket levee, as at Cairo, Illinois, the rainfall and seepage water have no outlet in times of high water, and are pumped out. A natural drainage characterizes all the levee districts of the South. A bayou generally enters the district at its upper end from the river course down through the country, receives the creeks from the high lands and smaller bayous from the river, and carries all to the river at the lower end of the district.

The Yazoo, Sunflower and Yallerbusha rivers, with their districts, are illustrative of this. The uniform slope of the alluvial lands, always equal to that of the river adjacent and parallel with it, assists materially in carrying down the country the rainfall and seepage water; the slope of the district from the river back to the bayou traversing the district, assist yet more in relieving the country of water.

The general features of the country to be reclaimed by the Sny Island Levee correspond very nearly with those of the Southern levee districts.

A bayou, the Sny Cartee, enters the levee district at its upper end from the river, traverses its whole length, and enters the river again at its southern extremity.

The levee embankment is now completed across this bayou 25 *b* at its upper end, and with good slopes to the material—a broad base and an ample protection of fascines in its outer slope—forms one of the strongest key levees in the world. Hereafter the Sny Cartee will act as a drain for the levee district.

If there is any difference in soil, general features of the country and natural drainage, between the Sny Island Levee district

ort of E. L. Corthell, Chief Engineer.

and the levee district of the lower Mississippi, the difference is every time in favor of the former. I say this advisedly, having carefully examined both districts.

2d. As to the material used in the embankment, it is safe to say that while all kinds of earth have been successfully used in the construction of levees—a clayey loom, if such can be found, is by far the best, and renders the bank more nearly impervious to water—while hundreds of miles of the Southern levees are built of sand, or a clay that quickly washes and wastes, nineteen-twentieths of the Sny Island Levee will be built of a firm clayey loam, equal to the best material used for puddle walls.

The slopes are such that they will stand in water, and exposed places are protected by fascine work.

With these reasons and facts to prove our work to be a success—with high and dry ridges on which to construct the levee—with a river whose changes are gradual and easily provided against, whose bed is sandy, allowing of scour to any needed depth, thus depressing rather than raising the high-water plane by throwing more water into the river—with a material for the banks that is hard, impervious, compact, and soon protects itself with sod—with a good levee law and an honest intention to carry out all its provisions—with a people anxious to build and willing to pay for the work—I say we may well be confident that soon one hundred thousand acres of the richest lands in the country will be wrenched from the grasp of the river and given, a lasting heritage, to the people.

In regard to the work done and to be done, I am pleased to be able to make a favorable report: The total estimate of the work is, approximately, 1,920,000 cubic yards of earthwork and 600 acres of clearing and grubbing, of which there was completed to January 1st, 1873, according to the relative estimate returned, 511,448 cubic yards of earth, and 271 27-100 acres clearing and grubbing.

The first twenty-four miles of the work have been opened up, which, if the weather will permit, will be completed, and form a continuous levee for that distance, before the 1st of March, or the early rise of the river this spring. The work accomplished already in so short a time, (three working months,) assures the completion of the whole work before the 1st of March, 1874.

I am glad also to state that thus far the work has been per-

formed by the contractors, Messrs. Skelsey, Fuller & Pierce,

with an energy, a persistence in the face of serious obstacles, and a faithfulness that, at least, argues well for the remainder of the work. Report of E. Corthell, C. Engr.

I am, sir, yours truly,
(Signed) E. L. CORTHELL,
Chief Engineer.

Engineer's Office.
Hannibal, Mo., Jan. 11, 1873.

I have knowledge of the work herein mentioned, and confirm the statements made by E. L. Corthell, Chief Engineer.
(Signed) ED. D. MASON, Con. Eng., Etc.

CERTIFICATE OF STATE AUDITOR.

Certificate of State Auditor

State of Illinois, Auditor's Office,
Springfield, Jan. 22, 1873.

Messrs. Skelsey, Fuller & Pierce:

Gentlemen:—In reply to yours of the 17th inst., as to the number of acres of land upon which the Sny Island Levee Bonds are a lien, under the drainage and levee act, and from the records in my office, furnished under said law, I would state, are as follows:

	Acres.	Benefits.
No. of acres, (1st grade.)	9,003.23	$ 7,858.44
" " 2d "	10,544.62	23,237.52
" " 3d "	10,591.16	56,763.76
" " 4th "	71,106.31	386,369.73
Railroad Benefits assessed		22,314.30
Total	101,245.32	$496,543.75
Total damages assessed to be paid by Levee Commissioners are, on	1,003.84	$2,117.12

I would also state that the Levee Commissioners have caused to be registered in my office, under registration act to secure payment of same, the following bonds up to date:

1872, Nov. 12, Forty Bonds, dated 1872, Oct. 1, amounting to	$40,000
1872, Dec. 17, Thirty-seven Bonds, dated 1872, Oct. 1, amounting to	37,000
1873, Jan. 16, Thirty Bonds, dated 1872, Oct. 1, amounting to	30,000
	$107,000

ate of Auditor. In my biennial report I have referred to the registration of these bonds, showing the amount registered up to that time; and which being the first issue, the Levee Commissioners filed in my office a copy of the assessment roll, showing the assessment of benefits and damages to the real estate within said levee district, as required by the act referred to; and also furnished proper evidence that the laws relating to the issue of the bonds, and other acts and proceedings of the commissioners in regard to said levee, to have been complied with.

Yours truly, (Signed) C. E. LIPPINCOTT,
Auditor Public Accounts.

10 IN THE CIRCUIT COURT

of the

UNITED STATES,

Southern District of Illinois.

JUNE TERM, A. D., 1878.

To the Honorable, the Judges of the Circuit Court of the United States of America within and for the Southern District of Illinois.

IN CHANCERY SITTING.

mplaint. Your Orator, Francis Palmes, who is a citizen of the State of Michigan, and a resident of the city of Detroit, in said State, on behalf of himself and all other persons who are interested with him in the enforcement of the collection of certain moneys hereinafter particularly specified, who will come in and contribute to the expenses of this suit, brings this his bill of complaint.

And thereupon your Orator complains and says, that heretofore on and before the 24th day of April, 1871, a large number of persons whose names, as far as was then known, are stated and set forth in a certain bound book, which is marked "Exhibit A," and filed with this your Orator's bill, and made part thereof, and many other persons whose names are unknown to your Orator, and who are stated in said "Exhibit A" to be unknown, were severally 20 the owners of the different tracts of land described and set

forth in the said "Exhibit A," and placed opposite their names, when known, and which are stated in said "Exhibit A" to belong to unknown owners, when unknown, all of which several tracts amount in the aggregate to about one hundred and ten thousand (110,000) acres. Bill of Compl.

And your Orator would further state unto your Honors: That all of the said several tracts of land described in said Exhibit are contiguous to each other, and together constitute a body of land situate and being in the Mississippi river bottom, in the counties of Adams, Pike and Calhoun and State of Illinois, and within the Southern District of Illinois, and said lands are also situated between the Mississippi river and the east line of the bluffs thereof, and are low and nearly level, and were originally formed by deposits of alluvium from the said river, and were traversed nearly throughout their entire extent by a slough or bayou known as the "Sny Carte Slough," and were intersected by other and smaller sloughs, some of which are short channels putting out from the river and returning thereto, and other channels starting from and returning to the said "Sny Carte Slough" and lateral branches or channels connecting the said "Sny Carte Slough" with the Mississippi river. That the whole of the said bottom lands afore named are below the high-water mark of the said river and were absolutely without protection therefrom, and were subject to overflow from the waters of said river, and were wet and marshy, and by reason thereof in an unhealthy and dangerous condition, and unfit for tillage or cultivation, and were at the time aforesaid of the small average value of not exceeding fifty cents per acre, and could not be reclaimed or protected without the construction of drains, ditches, levees or other works.

And your Orator would further show unto your Honors: That all of said lands were then so situated that it was impossible for the owner or occupant of any of the said tracts of land to drain, protect, or reclaim the same by independent or separate means, improvements or works, and the same could only be done by the co-operation and joint efforts of all the parties interested; and the said owners of the several tracts of the lands aforenamed, were unable to agree upon any practicable plan for the works necessary for the purpose, or to raise the means required for the construction of works adequate to the drainage and reclamation of the lands afore mentioned.

And your Orator further shows unto your Honors: That the

Complaint. several persons described in the said "Exhibit A," owners and occupants of the lands set forth therein, by name as known, or described as unknown, being anxious to drain, protect and reclaim their said several tracts of land, and to render them, by that means, fit for occupancy and cultivation, and to enhance their usefulness and market value, afterwards, to-wit, on the 24th day of April, 1871, caused and procured the General Assembly of the State of Illinois, to pass an act of the following title:

"An Act to provide for the construction and protection of drains, ditches, levees and other works," which act took effect and was in force on the first day of July, 1871, and is referred to as printed in the volume of the Legislative Session Laws, pages 356 to 365 Session Laws, 1871-2.

And your Orator would further show unto your Honors: That after the said act took effect, to-wit, at the August term, A. D., 1871, of the County Court of Pike county, in the State of Illinois, which Court then and there had lawful jurisdiction under said act, certain owners of certain of the tracts of the said lands, that is to say:

John Morris, N. S. Rouse, Joshua Mitchel, D. L. Harfon, B. Stillwell, A. J. Stillwell, John Buckenholder, James Davis, Ziled A. Sanders, Dennis Green, D. F. Smiley, Henry Edwards, Silas Beasley, Henry Koekn, Francis Daughters, W. A. Gordon, N. H. Close, Thomas W. Hull, R. B. Steadman, J. A Wilson, Robert Rankin, Joseph Elliott, N. W. Morris, S. M. Spencer, Southard N. Waller, Wm. Chandler, John G. Wheelock, P. A. Journey, Wm. Ness, E. C. Bridge, S. W. Martin, A. J. Woodard, R. M. Murray, A. A. Gose, C. B. Gose, S. Clark, Hobert Horton, John W. Bramell, H. J. Noyes, A. Myers, J. W. Sperry, D. Hull, J. N. Hull, R. Sweet, Henry Orr, Chamberlain & McTucker, C. T. Brewster, Harrison Brown, M. D. Massie, P. H. Davis, L. G. Hosford, Henry Howard, A. L. Ware, John Head, C. E. Dyke, Joseph Dean, H. Palmer, Cyrenius Gard, George McFarland, Cicero Gard, Philander Shipman, Benj. Sonboy, James A. Campbell, J. H. Bram-
4 c ble, Joseph M. Tolbert, Thos. C. Tolbert, James H. Tolbert, William Gaime, F. J. Jackson, John Aaron, Joseph C. Fentin, John J. Smiley, M. M. Adric, Thomas Whitworth William Hicks, H. R. Ramsay, A. G. Chamberlain, Henry B. Shaw, Elijah Petty, C. B. Dustin, Shaw & Rupert, A. Benjamin, W. M. Harris, J. M. Henry, E. C. Tryon, S. Taylor, John E. Sapp, J. G. Adams, F. Marion, Sarah Sapp, Poei— Wills, D. W. Hartstock, Thomas Ous-

ley, Jesse Long, S. S. Thomas, J. A. Thomas, William Yokem, John Ward, C. N. Bramble, J. D. Gorton, Moses Morey, C. E. Moran, C. M. Thurman, Edwin Draper & Bro., Granville Bekhart, D. Devol, Smith Hail, William Wilson, William Pratt, Calvin Neil, Eli Seehorn, Randolph Rable and Jacob Turnbaugh, on behalf of themselves and all others, and for the promotion of the objects and interests of all the other owners of said lands, acting under the authority of the said act so passed by the General Assembly to which your Orator has already referred, presented a petition to the said County Court of Pike County, which County Court then and there had jurisdiction and authority under said act to hear the same, in and by which said petition, the said John Morris and others, the owners and occupants of said lands, after describing said lands as part of the Mississippi river bottom, lying and being in the counties of Adams, Pike and Calhoun, in the State of Illinois, and stating therein that the said lands were situated between the Mississippi river and the east line of the bluffs of said river, and more particularly describing them as being in the following named townships, to-wit: Township numbered three (3), in Adams county; in townships numbered four (4), five (5), six (6) and seven (7), in Pike county, and in townships numbered eight (8) and nine (9), in Calhoun county, all being in range numbered five (5) west of the third principal meridian, and also as being in the following municipal townships, to-wit: In the township of Fall Creek, Adams county; in the townships of Kinderhook, Barry, Pleasant Vale, Atlas and Pleasant Hill, in Pike county, and in the townships of Hamburg and Belleview, in said Calhoun county; the said John Morris and others of the owners and occupants of the said lands, represented to the said court, in and by the said petition, that they desired to construct drains and ditches, and also a levee and other works across the lands of others in the said bottom lands for agricultural and sanitary purposes, and that they also desired to construct the same upon and along said bottom lands so as to reclaim said bottom lands from overflow by the waters of said river in order to make the said lands salubrious, and the soil thereof available for tillage and otherwise develop the agricultural resources of said bottom lands; and they further represented to the said court, in and by the said petition, that it was then and there necessary that drains, ditches, levees and other works should be constructed for the purposes aforesaid.

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And your Orator would further represent and show unto your Honors: That it was further represented to the said County Court, by the said John Morris and others, owners and occupants

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of the said lands, in and by the said petition, that the said bottom lands had been from time immemorial, and then was, a low and nearly level tract of land, formed by deposits of alluvium from the said Mississippi river; that it was traversed throughout nearly its entire length by a slough, or bayou, known as the "Sny Carte Slough;" that the said lands were intersected by other and smaller sloughs, some of which were then short channels putting out from the Mississippi river and returning thereto; while others of such smaller sloughs start from and return to the said "Sny Carte Slough;" and still others were then lateral branches connecting said "Sny Carte Slough," with the Mississippi river; and that the said lands were and are below the level of the high water mark of the said river and absolutely without protection therefrom; that the greater portion thereof was nearly every year inundated by the waters of the said river and all are subject to inundation and have been repeatedly submerged by said overflow, the river on such occasions being a stream from about four to eight miles wide, and running from bluff to bluff on either side.

And your Orator would further show unto your Honors: That it was in addition represented to the County Court aforesaid, by the said John Morris and others of the owners and occupants of said lands, in and by the said petition, that by reason of said exposure to overflow, the mass of the said lands had been allowed to remain in its primitive condition, and that it would so continue to remain unless reclaimed; that it was then sparsely popu-
6 c lated and that the occupants thereof then supported themselves almost exclusively by the cultivation of the soil; that they were every year greatly embarrassed in putting in their crops by the peculiar character of the rise in said river, which has no regular time for reaching its maximum height, nor any fixed number of rises during the season; that their crops, when planted, were frequently destroyed by an unexpected rise in said river, and that in such cases they were compelled to replant their crop or crops so late in the year as to render the operations of the season a total failure. And the said John Morris and others, the owners and occupants of the said lands, after stating other reasons therefor, all of which will appear at large by reference to said petition, which is made part of this Bill, a printed copy thereof being herewith filed marked "Exhibit B," alleged and set forth to said County Court, that it was necessary for the drainage and reclamation of their said lands included in the said bottom, that a levee and other works incident thereto, be constructed of the description following, that is to say, an earth embankment, beginning in said township of

Fall Creek, in said Adams county, thence out of said county through Pike county, into and terminating in said Hamburg township in Calhoun county, that is to say, more particularly, beginning at the Sand Ridge just above the north end of the said "Sny Carte Slough," thence across the same and southward continuously along the east shore of the Mississippi river to near the mouth of Hamburg bay, said embankment to be as high, or higher, than the high water mark of the year 1851—the highest known rise of the said river, and wide enough to resist the encroachments of floods, and as near the bank of said river, as might be found expedient. Bill of Comp

And your Orator would further show unto your Honors: That the said John Morris and others, the owners and occupants of the lands aforesaid, after setting forth other reasons for the construction of the works proposed, and the advantages which would follow the same, all of which will appear by reference to said petition, so made an Exhibit herein, as aforesaid, requested and prayed the said County Court of Pike county to appoint Commissioners under and by virtue of the provisions of the act of the General Assembly, of the State of Illinois, approved on the 24th day of April, 1871, entitled "An Act to provide for the construction of ce drains, ditches, levees and other works," for the purpose of constructing a levee on the Mississippi river, from a point on the said river, at or near the head of the "Sny Carte Slough," in the county of Adams, and thence in a southerly direction along and as near to the east bank of the Mississippi river as shall be deemed advisable for the safety of the proposed work, to a point at or near the mouth of Hamburg bay, in the county of Calhoun, and to do and perform any and all acts provided in the said law for the surveying, laying out, constructing, altering, repairing, enlarging, protecting and maintaining said proposed levee, including all necessary crossings, bridges, embankments, dams and side or other drains necessary for the construction of the said levee, and to render it efficient for the reclamation of the said lands lying east of the said river, and between it and the said bluffs, and then subject to overflow by the Mississippi river and other streams.

And the said petitioners did further pray the said County Court, in and by the said petition, that if it should be found by the said Commissioners proposed to be appointed in that behalf, that the proposed levee, and other works, could be constructed at a cost not exceeding five dollars per acre on all lands benefitted and reclaimed from overflow, according to their best judgment, and they should so state in their report, to be made to the said County

Complaint. Court, that then the said Court should confirm their said report, and order the said Commissioners to proceed with the construction of said work.

And the said petitioners further prayed the said County Court, in and by the said petition, that such assessments as might be made upon the property affected by the said work, should be ordered by the said Court to be paid in ten equal instalments, the first instalment to be paid three years after the date of the appointment of the Commissioners and the filing of the plans and specifications for said works with the Court, and one-tenth of such assessments, with accrued and accruing interest each year thereafter until the whole amount should be paid.

And your Orator would further show unto your Honors: That the said petitioners, in pursuance of the requirements of the second section of the act aforesaid, after filing their said petition, caused two weeks' notice to be given of their intention to present the said petition to the said court, by posting notices containing a statement of all the matters required by the said act in that behalf, in three of the most public places in each of said congressional townships through which said levee and other proposed works would pass, all of the same being inhabited, except township numbered five (5) in range numbered eight (8) west, in which there were no inhabitants; and in that case the said notices were posted in three of the most public places in the nearest inhabited townships, as provided in said act, and they also gave like notice by publishing a copy thereof in the Pike County Democrat, a newspaper published in the said county of Pike, where the said petition was filed, once in each week for two successive weeks, copies of which notices are herewith filed and referred to for greater certainty.

And your Orator would further show unto your Honors: That the said County Court then and there, after the filing of said petition, and the publication of the said notices as aforesaid, had full power and jurisdiction to hear the said petition and determine all matters pertaining thereto under and by virtue of said act, did in the legal and proper exercise of its jurisdiction, at a term of said court held in the month of September, 1871, upon full consideration of the matters aforesaid, find that the proposed drains, ditches and levees set forth in said petition, were necessary and useful for the drainage of the lands proposed to be drained thereby, for agricultural and sanitary purposes; and the said court did proceed then

and there to appoint three competent persons as Commissioners to lay out and construct said proposed works, as authorized by the fifth section of said act, to-wit: John G. Wheelock, of Adams county, and William Dustin and George W. Jones, of Pike county; and the said commissioners so appointed were directed and ordered by said court to proceed in accordance with the act of the General Assembly aforesaid, all of which will more fully, and at large, appear by reference to the records of said County Court of Pike county, a printed copy of which is herewith filed, and made part of this Bill, marked "Exhibit C." Bill of Comp

And your Orator would further show unto your Honors: That the said Commissioners, after their said appointment and before entering upon their duties, on the 23d day of September, 9c A. D. 1871, took and subscribed the oath prescribed by the sixth section of the act aforesaid, and in due form of law, elected one of their number as chairman, and another of their number as secretary, as required by the seventh section of said act, and did all other acts and things made necessary by the act aforesaid to their qualifications as such commissioners, and thereupon, by virtue of the provisions of the thirty-fourth section of the said act, became and were then and there clothed with the legal power and authority to do any and all acts that might be necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drains, ditches, levees or other works which might be necessary for the reclamation of the said bottom lands from overflow, including all necessary bridges, crossings, embankments, protections, dams and side drains, and were authorized to appoint all necessary agents and servants in that behalf, and to enter into all necessary contracts, and were made capable of suing and being sued.

And the said Commissioners, so being duly appointed and qualified in that behalf, then proceeded, as required by the ninth (9th) section of said act, to examine the lands of the said petitioners, proposed to be drained, and the lands over and upon which the work proposed to be constructed would be built, and such lands as would be benefited or damaged thereby, and after such examination—that is to say, at the November Term, 1871, of the said County Court of Pike county—said Commissioners determined and reported to the said Court that the starting point, route and terminus of the levee, and other works proposed in the said petition, and the proposed location thereof, were in all respects most proper and feasible; that the probable cost of the works would be

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five hundred thousand dollars, including all the necessary and incidental expenses thereof, and the expenses of the proceeding therein; that no injury would result to the lands from the construction of said work except what was then and there set forth in a certain paper filed with the said report marked "Schedule A" which was estimated at three thousand dollars; that all of the lands included within the limits designated in the said petition for the construction of said works would be benefited thereby, except 10 c the lands described in said "Schedule A," (being the site of said levee, and the lands from which earth would be taken for the construction of said levee); and they also determined and reported to the said Court that the aggregate benefits to the said lands would exceed the cost of constructing such works, including the incidental expenses and the cost of the proceeding therefor.

The said Commissioners also submitted with their said report to the said County Court, as a part thereof, the report of E. L. Corthell, Esq., a skillful and competent engineer, of his surveys to ascertain the cost of the said levee and other works, with his estimates of the cost thereof, and of the quantity of land which would be reclaimed and protected thereby, accompanied by a map of the district to be reclaimed and the profile of the work to be done,—all of which several reports of surveys, estimates, maps and profiles of the works to be done and the report of said Commissioners will be filed as a part of this Bill, designated by appropriate figures, and are referred to for greater certainty.

And your Orator would further show unto your Honors: That, afterwards, to-wit, at a term of the said County Court of Pike county, held in the month of December, 1871, in pursuance of law, in the matter of the said petition of John Morris and others, the proper notices required by the said act having been given as prescribed thereby, upon the application of the said petitioners and the said Commissioners for the confirmation of the said report, and all the owners of the said lands lying within the limits of the said tract of land described in the said petition having due notice of all of such proceedings, and none of them objecting thereto, it was ordered by the said Court that the report of said Commissioners be, and it was thereby in all things, confirmed and approved.

And the said County Court furthermore, and in pursuance of the directions contained in the sixteenth section of the said act, ordered and adjudged that a jury of twelve men, competent to serve as jurors be empaneled, who should be sworn to faithfully and im-

partially perform the duties required of them to the best of their understanding and judgment, and to make their assessments of damages and benefits according to law. Bill of Comp

And your Orator would further show unto your Honors:
11 c That, afterwards, to-wit, at a term of the said County Court held in the month of May, 1872, in pursuance of law, such proceedings were had in said Court; that a jury was duly summoned, empaneled and sworn as required by the sixteenth section of said act; and the said jury proceeded to examine the lands to be affected by the proposed works, and they then and there proceeded, to the best of their ability and judgment, to assess the damages and benefits which would or will accrue to, or be sustained by, the owners or occupants of said land by the construction of the proposed work; and they furthermore made out an assessment roll, in which they set down in proper columns the names of the owners of all said lands, when known, and when the names of the owners were unknown they stated them to be unknown; a description of the premises affected, in the most convenient manner; the number of acres in each tract; and when in any case damages were allowed by them on any tract of land, the amount of such damages; and where assessments were made against any tract of land for benefits, the amount of such benefits; and in cases where damages were allowed and benefits assessed against the same tract of land, the balance was carried forward to a separate column for damages or benefits, as the case required; which said assessment roll is truly contained and set forth in the bound book marked "Exhibit A," filed with this bill.

And your Orator further shows unto your Honors: That in all these proceedings the said jury conformed in all respects to the provisions of the seventeenth (17th) section of the said act; and that every other act and thing was done with respect to the said assessment by the said jury and all other persons, officers and courts required, or directed by the eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, and every other section of said act, so that all proper assessments of damages and benefits were made, and all proper notices required by law were given in the proper manner by and to the proper persons for the length of time prescribed by law, and all the assessments made by the said jury on the said lands were examined; the report was made by the said jury to the County Court as
12 c required by the said act, and thereupon and thereafter, to-wit: at the September term, A. D. 1872, of the said County Court,

Complaint. the said Court finally confirmed the said report and assessment, as required by the twenty-seventh section of the said act, and ordered the said assessment to be spread upon the records of said Court, and also ordered that the assessment as against all of the several tracts of land upon said assessment roll be paid in installments, as follows:

One tenth thereof in the year eighteen hundred and eighty-two, (A. D. 1882.)

One tenth thereof in the year eighteen hundred and eighty-three, (A. D. 1883.)

One tenth thereof in the year eighteen hundred and eighty-four, (A. D. 1884.)

One tenth thereof in the year eighteen hundred and eighty-five, (A. D. 1885.)

One tenth thereof in the year eighteen hundred and eighty-six, (A. D. 1886.)

One tenth thereof in the year eighteen hundred and eighty-seven, (A. D. 1887.)

One tenth thereof in the year eighteen hundred and eighty-eight, (A. D. 1888.)

One tenth thereof in the year eighteen hundred and eighty-nine, (A. D. 1889.)

One tenth thereof in the year eighteen hundred and ninety, (A. D. 1890.)

One tenth thereof in the year eighteen hundred and ninety-one, (A. D. 1891.)

And that interest be collected from and paid by the owners of each of said several tracts of said land on each of the several assessments for benefits aforesaid, as against each and every tract of land described in the finding and assessments of the said jury then on file, at the rate of ten per centum per annum from the first day of October, A. D. 1872; said interest to be collected 13 c annually in such manner as directed by the said act, and that said assessments and the said interest be a lien upon the lands assessed until paid.

And immediately after the entry of said order of confirmation by the said County Court, the clerk thereof made and certified to the said Commissioners separate copies of the same pertaining to the lands situate in the counties of Adams, Pike and Calhoun, which said separate copies of said assessment roll were afterwards, and before the 18th day of December, 1872, duly recorded in the Recorder's offices of the respective counties in which said lands were situated, and thereby became and were from thenceforth

notice to all persons of the lien of said assessments on said lands, as provided by the twenty-eighth section of said act. Bill of Co

And your Orator would further show unto your Honors: That the said Commissioners, in their report made to the said County Court of Pike county, on the 23rd day of November, 1871, estimated in detail for the necessary earth-work for said levee, the excavation, protection of slopes, the use of the land required for the site of the levee, the incidental damages to lands, the engineering work and contingencies at an aggregate amount of four hundred an ninety-eight thousand and seven hundred and thirty dollars ($498,730), as will appear by the report aforesaid; which levee and other works it was determined by the said Commissioners would be adequate to protect all of said lands from overflow from the said river when the water therein should rise to the maximum height of the flood of the year 1851.

And your Orator would further show unto your Honors: That after the confirmation of the said report, and the assessment for benefits and damages upon all of the several tracts of land described in said exhibit A, to-wit: On the 24th day of May, 1872, the said Commissioners, appointed by the said County Court, in performance of the duties imposed upon them by the said act and the several orders of the said court, proceeded to acquire the legal title to all the lands required for the site of the said levee and the other works and improvements connected therewith; and then relying upon the said assessments made upon the lands described in said exhibit for the means required to defray the costs and 14c expenses thereof, they entered into a contract with certain persons to construct, build and complete for them all the levees and other works proposed by the said petition of John Morris and othrs, and authorized by the order of said County Court.

A copy of the said contract is herewith filed, marked "Exhibit —," and made part of this bill and referred to for greater certainty.

And your Orator would further show unto your Honors: That it was provided in and by the thirty-seventh section of the act aforesaid, that the said Commissioners might borrow money for the construction of such levees and works, not exceeding the amount of the assessments made by the said jury under the order of the Court that at the time of such borrowing might remain unpaid; and secure such loans by notes or bonds bearing interest at a rate not exceeding ten per centum per annum, and not running

Complaint. beyond one year after the last assessment might fall due; which notes or bonds it was provided in said section of said act should not be held to make such Commissioners personally liable for the money borrowed thereon, but should constitute a lien upon the aforementioned assessments for the principal and interest thereof.

And your Orator would further show unto your Honors: That after said Commissioners were appointed and duly qualified as required by the said act, to-wit, on the 21st day of October, 1872, they were duly authorized by the said County Court of Pike county to borrow not exceeding five hundred thousand dollars upon bonds to be issued by the said Commissioners, as provided by the said act; and the said Commissioners afterward from time to time, as the said work progressed, made their certain coupon bonds, bearing date on the first day of October, A. D. 1872—one hundred and ninety-three (193) thereof being for the sum of five hundred dollars each, and four hundred and three (403) thereof being for the sum of one thousand dollars each, amounting in the aggregate to the sum of four hundred and ninety-nine thousand and five hundred dollars ($499,500), said coupon bonds being made by their terms payable at different dates thereafter, and bearing interest at the rate of ten per centum per annum, the said interest being payable on the first day of July in each year, all of which 15 *c* will more fully and at large appear by reference to a schedule showing a full description of said bonds filed with this Bill and marked "Exhibit D."

And your Orator would further show unto your Honors: That the said Commissioners, after making the said bonds, offered them for sale in market for money to be used in and about the construction of the said levee and other works; and your Orator, then and there, relying upon the act of the General Assembly aforesaid, and the proceedings of the said County Court and the said Commissioners, and having full confidence in the integrity and sense of justice of the said owners and occupants of the said lands so benefited and reclaimed by the said levee and other works, bought at par one hundred and sixty-two (162) of the said bonds of the denomination of one thousand dollars each, and also eighty-one (81) of the said bonds of the denomination of five hundred dollars each; and that the sums of money paid by your Orator for the said bonds, amounting in the aggregate to the sum of two hundred and two thousand five hundred dollars (202,500) actually came into the hands of the Commissioners and were by them used and employed and paid out for the construction and completion of said levee and other works, and the necessary expenses connected therewith.

And your Orator would further show unto your Honors: That afterwards, to-wit: on or about the 20th day of October, A. D. 1873, the said William Dustin, one of said commissioners, died, and the said County Court of Pike county, then and there, as it had lawful right and authority under the fortieth section of said act to do, appointed Benjamin F. Westlake, of Pike county, to succeed said Dustin, and said Westlake was then and there qualified as such Commissioner in due form of law. Bill of Com

And your Orator would further show unto your Honors: That after the said Commissioners had entered upon the construction of such levee and other works, and had nearly completed the same, it was discovered by the said Commissioners and the owners and occupants of the said lands that, for several sufficient reasons and from divers causes, the sum provided for by the assessment made by said jury on said lands and realized by the said Com-
16c missioners from the sale of said bonds, was not quite sufficient to pay the full cost of said works, and that it would be necessary to make a new and further assessment upon said lands to raise the amount of money required to cover and provide for such deficiency; and thereupon, on the 30th day of November, A. D. 1874, Charles N. Clark, F. Waller, jr., A. Southard, A. L. Allen, H. W. Morris, Jno. Aron, D. K. Ward, S. D. Barnes, J. K. Scarborough, Robert Rankins, Thos H. Branham, W. H. Brown, N. S. Rouse, Chas. E. Esterbrook, John Morris, M. M. Aldrich, T. J. Davis, S. F. Roderick, D. L. Hafner, A. F. Davis, W. M. Davis, A. J. Davis, B. Smiley, D. Green, David Smiley, F. Keaser, Josiah Thompson, M. W. Hughes, D. Hull, M. D. Massie, S. B. Taylor, Phil. Donohoe, G. R. Green, Thomas J. Fesler, E. Petty, J. G. Adams, Kennedy Long, Moses T. Miller, Norman Brown, William Owsley, Perry Wells, J. R. Wells, Geo. W. K. Bailey, Wm. McIntosh, Wm. A. Jackson, D. B. Berry, C. T. Brewster, J. C. Colvin, S. M. Spencer, Chas. B. Dustin, J. S. Irwin, A. C. Mathews, and J. N. Dewell, owners and occupants of said lands, presented their petition to the County Court of Pike county, and in the said petition, among other things, suggested to the said Court the amount of money that would be required to meet such deficiency, as is authorized by the forty-first section of said act, and thereupon all the notices were given and the proceedings had required by said act, and each and every officer, court and person performed and did every act and thing required by law in respect to said petition; and afterwards, to-wit, at the January term, A. D. 1875, of said Court, a jury was duly empaneled and sworn, as required by said act, and the said jury, after being so empaneled and sworn, elected one of their

Complaint. number as foreman and then proceeded to examine the lands affected by the said works and the damages and benefits which would be sustained by or accrue to each tract of said lands, and they proceeded to make an assessment roll of said lands, and do and perform all and every act and thing in respect to said lands and the completion of said assessment required by the seventeenth and all other sections of said act, and the said jury discovered that certain of the lands benefited by said levee and other works were omitted or overlooked in the former assessment, and they also, as they had lawful right to do, corrected said former assess-
17 c ment and fixed and apportioned upon the tracts of land omitted their due share and proportion of the cost of said works, and afterward duly reported such assessments to the County Court of Pike county aforesaid; and all the proper notices having been given to all necessary parties as required by said act, the County Court aforesaid having then and there full and competent jurisdiction and authority in that behalf, at the February term of said Court, in the year 1875, duly confirmed said report of said jury, and then and there ordered the assessment made by said jury upon each of said tracts of land described in said assessment roll, to be paid in installments:

One third thereof to be paid in the year 1892.
One third thereof to be paid in the year 1893.
One third thereof to be paid in the year 1894.

The whole of such assessment to bear interest from the first day of March, 1875, at the rate of ten per centum per annum, to be paid by the owners of said lands yearly, and it was furthermore ordered and adjudged by said Court that the amount of said assessments, and the interest thereon, be a lien on the lands against which they were chargeable until paid. All of which will more fully and at large appear by reference to such petitions, notices, affidavits, reports and proceedings relating to such assessment, and corrected assessment copies of the same being herewith filed, marked with proper letters and figures for their identification, and made part of this Bill, the said assessment roll being correctly copied in said book marked "Exhibit A."

And your Orator would further show unto your Honors: That, immediately after the entry of such confirmation in said Court, the clerk thereof made out and certified to said Commissioners a copy of such assessment roll and separate copies of the same, pertaining to the lands situated in Adams, Pike and Cal-

houn counties, which were severally on, to-wit, the 18th day of February, 1875, recorded in the Recorder's offices of each of said counties, and became then and there notice to all persons of such lien. Bill of Comp

And your Orator would further show unto your Honors:
18c That the said Commissioners, having already expended all of said money realized from the sale of the bonds before authorized by the said Court, afterwards, to-wit, on the 1st day of March, A. D. 1875, under the authority of the act before mentioned, for the purpose of borrowing the further sum of money necessary for the full completion of said levee and other works, made and executed one hundred and forty-eight (148) additional bonds for one thousand dollars each, dated on the said 1st day of March, 1875; fifty (50) of them payable July 1, 1892; forty-nine (49) payable July 1, 1893; and forty-nine (49) payable July 1, 1894, with interest coupons for ten per centum per annum—and offered them for sale on the market; and your Orator then, as before, relying upon the legal authority of said Commissioners and the assessments made upon said lands under said act, and upon the honesty of the owners and occupants of said lands, actually paid the said Commissioners par in cash for all of said bonds, and thereby, and by means of his purchase of a part of the first issue, became the legal holder and owner of bonds issued by said Commissioners and chargeable by law upon the said assessments made upon the said lands, to the amount of three hundred and fifty thousand five hundred dollars ($350,500)—all of which said bonds, with the unpaid interest coupons attached, will be produced to your Honors when it becomes necessary to do so, and are now in the possession of your Orator, subject to the inspection of any person or persons interested.

And your Orator would further state unto your Honors: That the said Commissioners appointed by the said County Court of Pike county in the proceedings before mentioned, proceeded to construct the said levee and other works according to the plans and surveys referred to in said proceedings, to such height and of such strength as protects all and every tract or tracts of land mentioned in such report from overflow from the Mississippi river; and all of said lands are, by means of such works, fully reclaimed and made salubrious, healthy and productive; and each and every of said tracts of land is benefited by said works to an amount greatly exceeding the sums assessed against the same by said juries
19c for its proportion of the whole cost of said works, and that the entire expense of such works was paid by said Commissioners with the money furnished by your Orator and others, the

plaint. purchasers of said bonds; and the said Commissioners, with the full knowledge of all the owners and occupants of said lands and for their use, sold said bonds, received your Orator's said moneys and expended them for the use of the said owners and occupants, as before mentioned.

And your Orator would further show unto your Honors: That by the twenty-ninth section of the act before mentioned it is made the duty of the said Commissioners, upon receiving a certified copy of the said assessment roll, to proceed to collect the said assessments, or any installments thereof; and they were authorized by the said act at their discretion, to certify such assessment or any installments thereof to the County Clerk of the county in which such lands were situated, for extension by him on the tax-books for the year for collection; and other provisions for the collection of such assessments and the interest thereon were made by the act aforesaid, and by another act of the General Assembly of the State of Illinois, entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same," approved April 9, 1872, which was passed at the instance and upon the application of the owners and occupants of said lands; and such Commissioners did afterwards, as your Orator is informed and believes, make some effort to collect the amount of some of the installments of said assessments and the interest thereon, but the courts of the State of Illinois before whom the question of the collection of such assessments and installments thereof under said statutes was brought, refused to give effect to the provisions of said acts, so far as they purported to authorize the collection of the same by the collectors of taxes under extensions on the tax-books, and no means are left for the collection of such assessments and interests except such as may be supplied by the general authority of the courts that have jurisdiction of such questions.

And your Orator would further show unto your Honors: That the whole amount of the moneys advanced by him, and by other purchasers of the bonds, with the interest thereon, remains unpaid, and that said Commissioners remain and continue in the actual use and possession of the said levee and other works, 20 c constructed with the moneys borrowed of your Orator and others, by the said Commissioners, under the proceedings aforesaid and they do, also, by and under the direction of the owners of said lands, keep and use the said works, to protect their own lands, and the lands of the other owners and occupants, from overflow from said river.

And your Orator further shows unto your Honors: That

the said Commissioners refuse to pay to your Orator and the other holders of said bonds, the whole, or any portion, of their principal—money loaned to them for the purposes aforesaid—or interest, and they also refuse to enforce the collection or the said assessments on the several tracts of land described in said Exhibit A, or the interest thereon, as is their duty to do, and the owners and occupants of said lands refuse to pay said assessments, or the interest thereon, so that the moneys loaned by your Orator for the construction of said works is wholly lost, together with the interest thereon. Bill of Com

And your Orator would further show unto your Honors: That the owners and occupants of said lands are very numerous, as will appear by the lists of land and the names of the owners thereof, as stated and set forth in the said Exhibit A, and the names of many of them are unknown to your Orator, but all them reside in other of the States of the United States than the State of Michigan; the greater number of them are residents and citizens of the State of Illinois and Missouri, and that the said Commissioners, John G. Wheelock, George W. Jones and Benjamin F. Westlake, are citizens of the State of Illinois, and of the Southern District aforesaid.

In consideration whereof, and forasmuch as your Orator is without remedy at law, he prays the interposition of your Honors in the premises, and may it please your Honors to take jurisdiction of this, your Orator's Bill of Complaint.

And may it please your Honors to grant to your Orator the process of subpœna directed to the said John G. Wheelock, George W. Jones and Benjamin F. Westlake, Commissioners as aforesaid, commanding them to personally be and appear before your Honors in this Honorable Court on a certain day, to be there-21 e in fixed, there and then a full, true and perfect answer make to all and singular the allegations of this, your Orator's bill, fully and unevasively, and as particularly as if the same were here again repeated and they specially interrogated thereto.

And on the hearing hereof, may it please your Honors to order and decree than an account be taken by some person, or persons, to be appointed by your Honors in that behalf, of the moneys loaned and advanced by your Orator to said Commissioners, to be used by them in the purchase and acquisition of the lands required for the location and construction of the said levee and other works, and for the construction and the completion of the said levee and all the works and improvements connected there-

plaint. with, together with the interest thereon, at the rate of ten per cent. per annum, according to the terms of said bonds and the coupons thereto attached, and when the amount due to your Orator for principal and interest as aforesaid, is ascertained, may it please your Honors to order and declare that your Orator is entitled to a lien upon the said levee and other works, and the lands acquired, owned and held by the said Commissioners for the site of said levee *and all other improvements, and upon the said* assessments upon all of the said lands described in the said Exhibit A, for the benefits to said lands, afforded by the said levee and other works, and the interest thereon. And may it please your Honors to further order and decree that the said Commissioners proceed at once, under the order and direction of your Honors, to collect such assessments upon all and every of said tracts of land and the interest that has, or that may hereafter, accrue thereon, or so much thereof, from time to time, as will be sufficient to pay the interest money or the principal, payable to your Orator as the same falls due, or that it may please your Honors to appoint one or more competent persons as receiver or receivers, to take possession and charge of the said levee and other works and manage and control the same, together with all the books, papers and properties of said Commissioners, and with authority to collect, under the order and direction of this Honorable Court, the said assessments and interest thereon, as often, and in such sums as may be sufficient to meet and satisfy the claims of your Orator as aforesaid.

And may it please your Honors to grant to your Orator such other and further relief as the case may require and to equity belong, etc.

FRANCIS PALMES,
Complainant.
PALMER, PALMER & ROSS,
Solicitors for Complainant.

LYMAN TRUMBULL,
JOHN ATKINSON,
of Counsel

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IN THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

JANUARY TERM, A. D. 1879.

FRANCIS PALMES,
vs.
BENJAMIN F. WESTLAKE, ET AL. } IN CHANCERY.

Answer of Benjamin Westlake & ot

The answer of Benjamin F. Westlake, John G. Wheelock and George W. Jones to a Bill of Complaint filed against them by Francis Palmes in the Circuit Court of the United States for the Southern District of Illnois, to so much and such portions thereof as they are advised it is material for them to answer unto, reserving all manner of just exception to the manifold insufficiencies and uncertainties of the said bill, said defendants answering say:

That upon information and belief they admit it to be true that the said Francis Palmes is a citizen of the State of Michigan as alleged in said bill. Said respondents further answering say that in so far as they have information or belief the said exhibit (A) referred to in said bill contains and sets forth the names of known and unknown owners of the several tracts of land therein described, so far as the records and best information then attainable showed, but respondents state that said records and information were not wholly reliable as to the ownership of said lands and respondents can only admit the allegation as to the ownership of said lands in a general sense to be correct, but that their information thereon is based wholly upon the premises stated, and there may be and
2 *d* likely were mistakes as to the ownership in many of the said tracts of land.

Respondents admit that allegations of said bill as to the description and location of said lands, and as to the character and quality of said lands, and that it was advantageous and desirable that the said lands should be protected from the high waters and overflows of the Mississippi River by means of a levee, or earth embankment as set forth in said bill.

Respondents answering to the general allegation set forth in said bill to the effect "That the several persons described in the said exhibit (A), owners and occupants of said lands by name as known,

or described as unknown, "being desirous to drain, protect, and reclaim their said several tracts of land and to render them fit for occupancy and cultivation, etc., etc., that they on the 24th day of April, 1871, caused and procured the General Assembly of the State of Illinois to pass the act entitled "An act to provide for the construction of drains, ditches and other works," described in said bill, and to any and all allegations in the said bill contained concerning the action or agency of the said land owners in procuring, aiding or assisting the enactment aforesaid or the subsequent enactment referred to in said bill entitled, "An act to provide for the registration of drainage and levee bonds and secure the payment of the same," approved April 9th, 1872, respondents say and admit upon information and belief that some of the land owners described as aforesaid did, with other citizens interested in drainage in the
3 *d* various localities of the state, aid and assist in procuring the enactments aforesaid; but respondent cannot admit that all of said described land owners, or that any considerable portion so aided and assisted in procuring said enactments. On the contrary respondents state the facts to be, upon information and belief, that a large proportion of said land owners were ignorant of all attempts to procure legislation upon the subject, until long after the said enactments, and were not consulted with in regard thereto, whilst a considerable portion of said land owners were entirely indifferent thereto, and took no part therein, and some portion thereof were adverse thereto, and at all times since have been adverse to such legislation. Respondents state the facts to be, so far as they can do so upon their own knowledge, information or belief, that a comparatively few in number of said land owners, were in conjunction with other citizens in other portions of the state active in procuring the enactment referred to, and that a yet larger number of said known and resident land owners, amounting probably to more than a majority of said known and resident land owners were favorable to said enactments though not aiding in their procurement or giving any expression to their opinions thereon, but that a portion of said land owners were averse to such legislation, and a portion wholly indifferent thereto, and that the owners of a majority in amount of the lands being non-resident or unknown, their wishes in regard to such legislation were unknown and not con-
4 *d* sulted. Respondents to the allegations of said bill in respect to the presentation of a petition by John Morris and others a portion of the owners and occupants of the said lands to the County Court of Pike County, Illinois, for the purpose of initiating proceedings for the construction of a levee as therein prayed, admits the filing and presentation of such petition as alleged, and re-

Answer o Benjamin Westlake o

spondents admit the fact of all such subsequent proceedings being had thereon and therein as are alleged and set forth in said bill, and respondents admit that all said proceedings in the said Court so far as known to respondents were in conformity to the statute recited in said bill as the authority therefor, but respondents do not and can not admit anything in respect of all the valid and legal effect of the said proceedings.

Respondents in respect of the allegation in said bill contained that said petition was presented by the said petitioners as well on behalf of themselves as all other owners of said lands referred to in said petition being the lands described in Exhibit (A) do not admit that said petitioners had any authority from any of the other of said land owners for the presentation of such petition, or that other owners than those named as such petitioners were assenting thereto. Respondents do not know and cannot answer as to the extent said petitioners may have been acting for other owners as well as themselves. Respondents state said petitioners in the matter aforesaid were acting on their own behalf only so far as they are advised and believe, and were not otherwise authorized 5*d* or entitled to act for others of said land owners, then the statute aforesaid may have authorized them to so act.

Respondents admit the appointment of commissioners under the said proceeding in the County Court of said Pike County as alleged, and the subsequent change as to one of the said commissioners as alleged; admit that said commissioners were qualified by oath (but not by giving bond) as alleged and undertook the performance of the duties prescribed by the statute aforesaid and the orders of said court recited; admit that the contract for the construction of said levee was let as charged, admit the execution, issue and sale of bonds as charged under the authority of the statute and order of the County Court recited in said bill,—admit from information and belief that Complainant was the purchaser, and is the holder and owner of the number and amount of said bonds charged in said bill, but deny that said complainant purchased said bonds from these respondents. Respondents state that they delivered and paid out said bonds to the contractor and respondents do not know and cannot admit anything as to how much said complainant may have paid for them. Respondents admit information in regard to the amount paid was that the contractors sold said bonds at about twenty-five cents to the dollar; that said commissioners proceeded to the location and construction of the said levee as stated in said bill, and that the moneys raised by the bonds aforesaid were applied to and used in the

6 *d* construction of said levee; admit that the sum of money provided to be raised under the original estimate and order of the Court proved inadequate to the construction of said levee as proposed, and that there upon and upon the subsequent petition set forth in said bill, the subsequent proceedings detailed in said bill were had in said Court for the raising of an additional sum of money as set forth in said bill, and that under the said proceedings additional bonds issued as alleged in said bill admits that complainant may have become the purchaser and holder of the additional amount of said bonds as claimed in said bill, but state that said bonds were delivered and paid by respondents to the contractors for said levee work, and that complainants purchase thereof must have been from said contractors or parties to whom they negotiated the same, and respondents information and belief is that complainants did not pay for said bonds, but only about the sum of seventy-five cents to the dollar. Respondents deny that they ever borrowed of complainants any sum of money on bonds or otherwise for the construction of said levee thereon, as herein stated. Respondents to the allegations of said bill to the effect that said levee was completed to such height and strength as to protect all said lands from overflow and that all of said lands have been reclaimed thereby and made healthy and productive and that said lands were greatly benefited thereby, admit that said levee was completed, by the contractors for constructing the same, and the same was received by respondents as a complete levee, sufficient
7 *d* in height and strength to protect said lands from overflow, but that it was subsequently developed that said levee became defective by settling, the wear of waters and other causes, and that it became necessary after all funds had been expended in respondents' hands for such of the land owners as felt interested in maintaining the same, to raise voluntary funds for the repair of said levee, so as to save said levee from destruction. But for this voluntary aid said levee would now be worthless.

Respondents state that by the addition of other labor, means and funds than those raised as alleged in said bill, said levee has been rendered a partial success in protecting said lands from overflow, and in reclaiming a considerable portion thereof. Respondents state from information and belief that it will require for a series of years an expenditure of from ten to twelve thousand dollars to repair and maintain said levee. Your respondents cannot answer as to what amount or extent the value of said lands has been enhanced or benefited thereby, and cannot admit the allegation that all of said lands have been benefited to the extent of the

assessments made thereon under said proceedings. From information and belief they state that a large portion of said lands have not benefited to the extent of the assessment so made thereon as benefits and some portions thereof have not in any wise been benefited by said levee.

Respondents to the allegation that said moneys so procured 8*d* upon said bonds, was so procured and expended with the full knowledge of all the owners of said lands are unable to answer whether the same is true or not, and can admit nothing in respect thereof further than that they believe a considerable number of the resident owners of said lands did know from common report, that said levee was being built with the proceeds of the bonds so issued.

Respondents answering to the charges of said bill in respect to the action and conduct of these respondents in the matter of the assessments aforesaid deny all charges or statements in said bill imputing to them neglect of duty, or want of good faith in the matter of the collecting of said assessments or of discharging any duty in respect of discharging interest upon said bonds, which devolved upon them.

Respondents state that the holders of said bonds, having registered the same in the office of the Auditor of Public Accounts of the state of Illinois, under an act amendatory of said first recited act, under which they were issued, approved April 9th, 1872, the holders of said bonds thereby elected the mode prescribed in said amendatory act for the collection of interest upon said bonds, and your respondents were by the election of said holders of said bonds relieved and discharged from the duty of looking after the same, and are in no wise responsible or at fault for the failure to collect money to pay said interest.

Respondents after the said Registration of said bonds, had 9*d* no duty whatever to perform in respect to collecting said assessments, by the provisions of the statute referred to.

Respondents in answer to that portion of said bill referring to their action in the matter of said collections state the facts to be, that a portion of the land owners described in said exhibit (A) had at all times opposed the proceedings by which or under which the lands respectively owned by them had been subjected to assessment for benefits supposed to accrue thereto, by reason of said levee, and had refused to pay assessments, or taxes grounded on such assessments, and had given out and made declaration of their

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intent to resist such payment until compelled to do so by the Courts of last resort,—that in consequence of this, others of said land owners willingly inclined to pay their assessment saw at once the futility of so doing unless payment could be enforced against all alike; that this resulted in a return by the local or township collectors within whose towns the said lands were situated of all or nearly all of said lands as delinquent—that the County Collector made application for judgment for the taxes and assessments against said delinquent lands to the County Court of Pike County, Illinois, at the term thereof, A. D. 18 , that the land holders so opposing said assessments or a portion of them appeared and opposed judgment against their lands for such assessments, setting up that the law under which they were imposed was unconstitutional and void. That your respondents employed
10 *d* counsel to prosecute the application for judgment and to prosecute for the collection of said assessments, respondents believing that if said assessments could not be collected said levee could not be maintained; that judgment was given by the County Court against the lands for the unpaid assessments, that appeals were taken to the Circuit Court by the resisting land owners, and the judgments against the lands there affirmed; that appeals from these judgments were prosecuted by the resistants to the Supreme Court of the State (one appeal by stipulation to be decisive of all the appeals), that respondents being fully apprised of the importance of the questions involved in said appeals upon the rights of said bond holders, from time to time informed them, or parties supposed to be such land holders of the progress of these proceedings for the collection of said assessments, that up to the appeal of said cases to the Supreme Court of the State, respondents relied upon their local counsel (the Hon. W. A. Grimshaw) to prosecute for said assessments, but said appeals having been taken to the Supreme Court, respondents and said bond holders cooperated in the employment of eminent counsel to assist in the presentment and argument of the case in the Supreme Court, and that in that Court said cause was fully presented and argued by the counsel referred to, and the decision of said court was rendered adversely to the right to collect said assessments; that said counsel presented to the Court their petition for a re-argument of said cause and adduced reasons and arguments therefor, which
11 *d* said petition was overruled by the Court and the final judgment rendered by said Court was adverse to the right to collect said assessments. Respondents refer to the case of Webster v. People, and the proceedings therein, as also to the case referred to therein, which the Court in its opinion say is decisive of said

case of Webster v. People, the Court referring to the case of Updike v. Wright, 81st Ills., p. 49, as decisive of said Webster case. Respondents file herewith as part of this case the said opinion in the Webster case.

Respondents were advised and believed that said case was decisive against any right on their part in any manner to enforce payment of said assessments, and yet believe the same.

Respondents to the allegations in said bill contained that they acquired the legal title to the lands for the site of said levee, answering thereto, say, that they cannot admit said allegation to be true. Respondents state the facts to be that in a few instances receipts for money paid as damages were executed to them by land owners over whose lands the said levee was located, the consideration of the construction and maintenance of said levee entering into the consideration of the amount of such damages but that damages for a comparatively small portion in length of the site of said levee were so receipted for that the greater portion or length of said levee and site thereof ran over the lands of unknown or non-resident owners from whom no release of right of way was 12 *d* obtained, and to whom no damages were ever paid, and that portions of said site ran over lands of resident or known owners to whom damages were awarded, but never paid, that so much of the site of said levee for which damages were paid would not exceed five miles in length, and this in isolated tracts along the line of said levee.

And respondents as to the charges in said bill that these defendants as such commissioners remain and continue in the actual use and possession of said levee and other works constructed with moneys borrowed of complainant and others say that as they are informed and verily believe, they as such commissioners are not now, and never have been in actual possession of any part of said levee or other work except for the purpose of constructing, maintaining and repairing the same; that they have never had title to any portion of said levee as they are likewise advised and believe on account of the unconstitutionality of the law under which said works were done. And that since said law was declared unconstitutional these respondents as commissioners have exercised authority over said levee only in warning parties against injuring the said levee, but in their private capacity at the request of a portion of the land owners who supplied them with funds for that purpose they have tried to keep said levee in repair; and they further reply that no deeds of conveyance or release were ever made and delivered by any owner of lands upon which said levee

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or any part thereof was located to these respondents as such commissioners, and they never understood that under said en-
13 *d* actments referred to they had any possession of said levee, but only an authority in respect thereto.

Respondents state that by a judgment and decree of this Court in a case in which Shaw and Rupert were complainants and these respondents were defendants, said complainants have authority to open and cut said levee, and to restore a water course to its former channel, and that the execution of said order stands suspended only by agreement on the part of a portion of said land owners, with the complainants in said cause, and if said levee should be opened as ordered by said decree, said levee will be wholly worthless for any purpose; and respondents having now fully answered pray to be dismissed.

GEORGE W. JONES,
BENJAMIN F. WHITTAKER,
JNO. G. WHEELOCK,
By Hay, Greene & Litten.

HAY, GREENE & LITTEN,
Solicitors for Defendants.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

George W. Jones, being sworn, on his oath says that he is one of the defendants whose answer is above written; that all the statements in said answer contained as being within the knowledge of said defendants are true, and all statements therein contained as being made on information and belief are true as this affiant is informed and verily believes.

GEO. W. JONES.

Subscribed and sworn to before me this — day of March, 1879.

J. A. JONES, Clerk.

Decree March 13.

Decree of March 13, 1879.

Francis Palms, Complainant,
vs.
John G. Wheelock, George W. Jones and Benjamin F. Westlake, Defendants.

1 e Came the parties by their solicitors and the defendants having by leave of the court withdrawn their demurrer to the complainants bill heretofore interposed now file their answer thereto and the cause was by the consent of the parties set down for hearing upon the bill and answer.

And the cause now coming on to be heard it was argued by the counsel of the respective parties and having been fully considered by the court and the court being now fully advised of and concerning the questions arising upon the said bill and answer doth order, adjudge and decree that the said defendants take, retain and hold the right of way, lease, and other works and property in question and described in the pleadings, and keep, take care of, preserve and protect the same, under the order and control of this court, for the benefit of and on behalf of the complainant, and all other parties interested therein, or who may hereafter be found to be interested in the same in whole or in part.

And it was further ordered by the court that the complainant
2 e and all other persons who may have loaned or advanced money to the defendants for the acquisition by those of the said right of way or for the construction of the said levee and other works or property connected therewith or who may be the holder of any of the bonds issued by said defendants to raise money for the purposes aforesaid or to pay for such right of way or the construction of such levee and other works or to pay any of the proper expenses connected therewith who may come into this suit contributing their proper proportion to the expenses thereof, have
3 e liberty to go before the Master and produce these said bonds and coupons for interest thereon and make proof the amount due them of principal and interest on account of such loans, advances and bonds, and the cause is referred to John A. Jones, Master in Chancery, for the purposes aforesaid who will upon the application of the complainant or other persons who may have come into the cause as complainants upon the terms hereinbefore prescribed and reasonable notice to the defendants or their solicitors proceed to take the proofs of the amounts due the complainants and allow parties who may have before that time come into the

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13, 1879.

cause, and after such proofs are taken, make a report to the court of the amounts found by him to be due each and any party who may appear before him and the grounds and facts of his several findings and conclusion.

And it was furthermore ordered adjudged and decreed by the court that after the coming in of the Master's report of the amount or amounts found by him to be due to the complainant or other persons who may come into the cause as aforesaid and the approval of the said report and the determination and adjustment by the court of the amount or amounts due to the complainant or
4 *e* other persons who may come into the cause for moneys advanced or loaned or bonds held as aforesaid, the said complainants or other persons have the liberty to exhibit and file their supplemental bill or bills against any or all the present or former owners of the said lands alleged on said bill to be benefited by the said levee and other works or who have heretofore or who may now be in any way interested in the said levee and other works or the lands benefited thereby to compel them to contribute to the payment of the amount or amounts which may be found due to the said complainant or other persons as aforesaid and for such other and further relief as they may be advised they are entitled to, and the court reserves all other questions of relief to the parties, and of the costs to be considered hereafter. And the said complainant is at liberty to use the names of the defendants in any such proceeding by way of supplemental bill if they are advised it is necessary to do so upon rendering them a sufficient indemnity against all costs and expenses.

5 *e* Francis Palms vs. John G. Wheelock and others. Draft of decree.
Filed March 13, 1879.

J. A. Jones,
Clerk.

filed
7, 1880.

Decree of July 7, 1880.

In the United States Circuit Court, Southern District of Illinois.

1 *f* Francis Palms, The First National Bank of Salem, North Carolina, Curtis Guild, J. W. Daniels, J. F. Kimball, Horace Smith, William Goddard, Daniel Day, A. Grannis, Alice H. Ducharme, C. Van Huson, Sarah Ann Smith, Andrew Moody, E. P. Kimball, J. K. Lord, N. R. Stidman, Albert Blair, Amos J.

Stillwell, John E. Stillwell, John H. Garth, David Dubach, Mary A. Stillwell, Margaret A. Stillwell and John A. Stillwell, Jessie A. Stillwell, Mabel Stillwell, who sue by their guardian Mary A. Stillwell, Complainants,

Against

John G. Wheelock, George W. Jones and Benjamin F. Westlake, Defendants. } In Chancery,

Decree of July 7, 18

2*f* And now on this seventh day of July, 1880, come again the complainants by their solicitors, and submitted the report of John A. Jones, Esq., Master in Chancery, to whom this cause was referred by an order made on the 13th day of March, 1879; and also came the defendants by their solicitors, Messrs. Hay, Greene & Littler, and filed their exceptions to the said report of said Master; and the court having heard the arguments of the counsel of the respective parties upon the said report and the exceptions thereto, it was ordered, adjudged and decreed by the court that the said exceptions be overruled, and the said report of the said Master in Chancery be in all things confirmed and approved.

And the court doth further order, adjudge and decree, that there is due to the several complainants upon their respective coupons produced and proved before the said Master, and for interest upon the amounts of such coupons, from the date of their maturity up to the first day of July, A. D. 1880, as reported by the said Master in Chancery the following sums, that is to say:

To the said complainant, Francis Palms, the sum of two hundred and twenty-one thousand, two hundred and twenty-eight dollars and twenty-six cents ($221,228.26).

To the said complainant, The First National Bank of Salem, North Carolina, the sum of three thousand, four hundred and fifty dollars ($3,450.00).

To the said complainant, Curtis Guild, the sum of twenty-eight
*f*3 hundred dollars ($2,800.00).

To the said complainant, J. W. Daniels, the sum of three thousand and eighty dollars ($3,080.00).

To the said complainant, J. F. Kimball, the sum of thirty-three hundred and sixty dollars ($3,360.00).

To the said complainant, Horace Smith, the sum of fourteen thousand dollars (14,000.00).

To the said complainant, William Goddard, the sum of eight hundred and forty dollars ($840.00).

To the said complainant, Daniel Day, the sum of thirteen hundred and eighty dollars ($1,380.00).

Decree filed July 7, 1880.

To the said complainant, A. Grannis, the sum of nineteen hundred and sixty dollars ($1,960.00).

To the said complainant, Alice H. Ducharme, the sum of six hundred and ninety dollars ($690.00).

To the said complainant, C. Van Huson, the sum of seven thousand, one hundred and eighty dollars ($7,180.00).

To the said complainant, Sarah Ann Smith, the sum of eight hundred and forty dollars ($840.00).

To the said complainant, Andrew Moody, the sum of five hundred and sixty dollars ($560.00).

To the said complainant, E. P. Kimball, the sum of ten thousand and eighty dollars (10,080.00).

To the said complainant, J. K. Lord, the sum of eleven hundred and twenty dollars ($1,120.00).

To the said complainant, N. R. Stidman, the sum of two thousand and seventy dollars (2,070.00).

To the said complainant, Albert Blair, the sum of two hundred and eighty dollars ($280.00).

To the said complainant, Amos J. Stillwell, the sum of twelve
4*f* thousand six hundred and thirty dollars ($12,630.00).

To the said complainant, John E. Stillwell, the sum of three thousand and eighty dollars ($3,080.00).

To the said complainant, John H. Garth, the sum of five hundred and sixty dollars ($560.00).

To the said complainant David Dubach, the sum of fourteen hundred dollars ($1,400.00).

To the said complainant, Margaret A. Stillwell, the sum of sixteen hundred and eighty dollars ($1,680.00).

To the said complaidant, John A. Stillwell, the sum of sixteen hundred and eighty dollars (1,680.00).

To the said complainant, Jessie A. Stillwell, the sum of sixteen hundred and eighty dollars ($1,680.00).

To the said complainant, Mabel Stillwell, the sum of twenty-two hundred and forty dollars ($2,240.00).

And to the said complainant, Mary A. Stillwell, the sum of five thousand and forty dollars ($5,040.00), making an aggregate sum so found due to the complainants as aforesaid of three hundred and four thousand, nine hundred and eight dollars and twenty-six cents ($304,908.26). The above amounts are found due without prejudice.

And it is further ordered, adjudged and decreed by the court that the said several sums of money so found to be due to the said complainants as aforesaid, are a lien upon the assessments made

under the order of the County Court of Pike County, in the State of Illinois, upon the lands described in the bound book 5*f* Exhibit "A" with complainant's bill, and upon the said lands as provided in the twenty-seventh and thirty-seventh sections of An Act of the General Assembly of the State of Illinois entitled: Decree filed July 7.

"An Act to provide for the construction and protection of drains, ditches, levees and other works," approved April 24, 1871.

And it further appearing to the court that the defendants, commissioners under the several orders of the County Court of Pike County, aforesaid, have no money in their hands for the payment of the amounts so found and adjudged to be due to the said several complainants, and it also appearing to the court from the allegations of the complainants bill, and not denied by the said defendants in their answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the court that the complainants have the right and liberty to proceed in this court in the name of the said defendants as complainants as such commissioners, or in their own names as complainants against the lands described in the said Exhibit "A" and the owners thereof, or such of such lands and the owners thereof or other persons, and said commissioners as they may be advised, are liable for or bound to pay the sums 6*f* found to be due to the complainants as aforesaid jointly or severally by a bill or bills, original, supplemental or otherwise, as they may be advised for the recovery of the amounts found due them as aforesaid and also for the costs of this suit.

Correct—Enter. T. D., July 7, 1880.
Francis Palmes v. John G. Wheelock, et al.
Decree confirming Report of Master.
Filed July 7, 1880.

J. A. Jones,
Clerk.

tion, filed
e County,
, 1871.

STATE OF ILLINOIS, }
COUNTY OF PIKE. }

IN THE COUNTY COURT OF THE COUNTY OF PIKE.

2 *g* August Term, A. D. 1871.

In the matter of draining, ditching, leveeing and protecting the Mississippi river bottom land lying between said river and the east line of bluffs of said river, in the counties of Adams, Pike and Calhoun in said state of Illinois.

To the Honorable, the County Court of the County of Pike in the State of Illinois:

Your petitioners would respectfully represent that they are owners and occupants of the lands situate in and being a part of the Mississippi bottom land lying and being in the counties of Adams, Pike and Calhoun in the state of Illinois, and that said tract of bottom land is situate between the Mississippi river and the east line of bluffs of said river, and is more particularly described as being in the following named and numbered congressional townships, to-wit: In township No. (3) three in said Adams county. In townships numbered four, five, six and seven in said Pike county, and in townships numbered eight and nine in said Calhoun county, and also more particularly described as being in the following named municipal townships, to-wit: In the township of Fall Creek in said Adams county; in the townships of Kinderhook, Barry, Pleasant Vale, Atlas and Pleasant Hill in said county of Pike, and in the townships of Belleview and Hamburg in the said county of Calhoun.

Your petitioners would further say, that they desire to construct drains and ditches and also a levee and other work across the lands of others in said bottom land for agricultural and sanitary purposes, and that they desire to construct the same upon and along said bottom land so as to reclaim said bottom land from over flow by the waters of said river in order to make the location salubrious and render the soil available for tillage and otherwise develop the agricultural resources of said bottom land; and further say, that it is necessary that said drains, ditches, levee and other work should be constructed. Your petitioners further state, that said bottom land has been from time immemorial, and now is, a low and nearly level tract of land formed by deposits of alluvium from said river; that it is traversed throughout nearly its entire length

3 *g* by a slough or bayou known as the Sny Cartee slough; that bot-

tom land is also variously intersected by other and smaller sloughs, some of which are short channels putting out from the river and returning thereto, while others start from and return to the said Sny Cartee slough, and others are again lateral branches connecting said Sny Cartee slough with the river; that the said bottom land is below the level of the high water mark of said river, and absolutely without protection therefrom; that the greater part thereof is nearly every year inundated by the waters of said river, and all are subject to inundation, and have been repeatedly submerged by said overflow; the river on such occasions being a stream from about four to eight miles wide and running from bluff to bluff on either side.

Original Petition in Piko C. Aug. 3, 1

Your petitioners would further state, that by reason of said exposure to overflow, the mass of the said bottom land has been allowed to remain in its primitive condition, and will so remain unless reclaimed: that it is but sparsely populated, and that the occupants thereof support themselves almost exclusively by the cultivation of the soil; that they are every year greatly embarrassed in putting in their crops by the peculiar character of the rise in said river, which has no regular time for reaching its maximum height, nor any fixed number of rises during a season; that their crops when planted are frequently destroyed by an unexpected rise in said river, and in such cases they are either compelled to replant their crops, or the crops are destroyed so late in the year as to render the operations of the season a total failure.

Your petitioners further say, that upon the subsiding of the waters, the said bottom land is left in a wet and marshy condition, so that stagnant water is left on various parts of its surface, and the succeeding heat of summer and autumn evolve therefrom malaria and disease.

Your petitioners further state, that by reason of said facts, said bottom land not only now remains sparsely populated, while the territory around it is thickly settled, but the same is practically incapable of supporting any further population, so that the average taxable value of the lands now subject to overflow is no more than about fifty cents per acre, and the present occupants of said bottom lands have been in most cases induced to remain solely by the prospect of the ultimate reclamation of said land, a consummation which has been the theme of their enterprise and endeavor ever since the settlement of the bottom land described.

inal tion, filed Pike County, 2, 21, 1871.

Your petitioners further state, that the following is a description of the proposed starting point, route and terminus of said drains and ditches, to-wit: Beginning in said township of Fall Creek, in said county of Adams, at or near the head of the Sny Cartee slough aforesaid, on the bank of the Mississippi river, run thence southward with the channel of said Sny Cartee slough out of said Adams county, near the middle of said bottom land, through Pike county, and into said Calhoun county, to a point near the south end of said Sny Cartee slough, and thence to and through King's lake into Hamburg bay, and thence with said Hamburg bay into the Mississippi river at a point in said Hamburg township, in said Calhoun county, all in the state of Illinois.

Your petitioners further state, that it is necessary for the drainage of their lands in said bottom, and for the drainage of all of said territory included in said bottom land, that a levee and other work incident thereto be constructed, and they deem it necessary that the same shall be constructed, and they say that the following is a description of the same as proposed, to-wit: An earth embankment, beginning in said township of Fall Creek, in said Adams county, thence out of said county, through said Pike county, into and terminating in said Hamburg township, in said Calhoun county, all in the state of Illinois, that is to say, beginning at the sand ridge just above the north end of the said Sny Cartee slough, thence across the same and southward, run continuously along the east shore of the Mississippi river to near the mouth of said Hamburg bay, said embankment being as high or higher than the high water mark of the year 1851, the highest known rise of said river, wide enough to resist the encroachments of floods, and as near the bank of the river as may be found expedient, and all of said drains, ditches, levees and other work being located within the limits of said congressional and municipal townships.

Your petitioners further state, that by means of the completion of said enterprise the further overflow of said bottom lands will be prevented, and that the soil thereof will be reclaimed so as to inviterate and support a dense and prosperous population, and will be made as valuable for agricultural purposes as any land in the state.

Your petitioners further state, that some of the owners of the
5 g land upon which the above proposed amendments are to be constructed are non-residents of this state, others are infants and married women, and that the resident owners cannot all agree upon the means of carrying out the above works.

Your petitioners further state, that nearly all of them reside in or near said bottom and live by the tillage of its soil and nearly all of your petitioners are owners, holding titles to not less than the aggregate amount of nearly forty thousand acres of the above described land, which will be affected by said improvements.

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filed in P
County,

Your petitioners further say, that the above proposed drains, ditches, levee and other works are necessary and will be useful for the drainage of said lands proposed to be drained, to-wit: The said Mississippi river bottom land, and that said proposed drains, ditches and levee and other works are necessary and will be useful for said lands proposed to be drained for agricultural and sanitary purposes; and they further say, that the starting point, route and terminus of said proposed drains, ditches, levee and other works aforesaid, and the location thereof, are in all respects proper and most feasible, and that said proposed work can be done at an aggregate cost and expense not exceeding the actual, direct, positive, immediate and incidental benefits which said work will confer on said lands.

Wherefore, your petitioners would respectfully call the attention of the Honorable Court to an act passed by the General Assembly of the state of Illinois, approved on the twenty-fourth day of April, in the year one thousand eight hundred and seventy-one, and entitled "An act to provide for the construction of drains, ditches, levees and other work," and would respectfully ask the appointment of commissioners, in accordance with the provisions of said law, for the purpose of constructing a levee on the Mississippi river, from a point on said river at or near the head of the Sny Cartee, in the county of Adams and state of Illinois, and thence in a southerly direction along or near the east bank of the Mississippi river, as shall be deemed advisable for the safety of the proposed work, to a point at or near the mouth of Hamburg bay, in the county of Calhoun, state of Illinois, and to do and perform any and all acts, as provided in said law, for the surveying, laying out and constructing, altering, repairing, enlarging, protecting and maintaining said proposed levee, including all neces-
6 *g* sary bridges, crossings, embankments, dams and side, or other drains necessary for the construction of said levee, or to render it efficient for the protection and reclamation of the lands lying east of the said levee and between it and the bluffs, and now subject to overflow by the Mississippi river and other streams.

Your petitioners would further suggest, request and petition

the court that if it should be found by the commissioners that the proposed levee can be constructed at a cost not exceeding five dollars per acre for all lands benefited and reclaimed from overflow, according to their best judgment, and shall so state in their report, that the court will confirm their report and order the commissioners to proceed with the construction of the work.

Your petitioners would further pray, that the assessment for benefits upon the property to be affected by the construction of said work shall be paid in ten equal annual installments, the first installment being due and payable three years after the date of the commissioners' report, and the filings of the plans and specifications with the court, and one-tenth of such assessment, with accrued and accruing interest each year thereafter until the whole amount shall have been paid; your petitioners further pray for such other and proper relief in the premises as to the court shall seem meet.

John Morris,
N. S. Rouse,
Joshua Mitchel,
D. L. Harfon,
B. Stilwell,
A. J. Stilwell,
John Buckenholder,
James Davis,
Ziled A. Sanders,
Dennis Green,
D. F. Smiley,
Henry Edwards,
Silas Beasley,
Henry Kohn,
Francis Daughters,
W. A. Gordon,
N. H. Close,
Thos. W. Hull,
R. B. Steadman,
J. A. Wilson,
7 g J. W. Sperry,
J. N. Hull,
D. Hull.
R. Sweet,
Henry Orr,
Chamberlain & McTucker,
C. T. Brewster,
Robt. Rankin,
Joseph Elliott,
N. W. Morris,
S. M. Spencer,
Southard N. Waller,
Wm. Chandler,
John G. Wheelock.
P. A. Journey,
Wm. Ness,
E. C. Bridge,
S. W. Martin,
A. J. Woodard.
R. M. Murray,
A. A. Gose,
C. B. Gose,
S. Clark,
Hobert Horton,
John W. Bramell,
H. J. Noyes,
A. Myers,
Henry B. Shaw,
Elijah Petty,
C. B. Dustin,
Shaw & Rupert,
A. Benjamin,
W. M. Harris,
J. M. Henry,

Harrison Brown,
M. D. Massie,
P. H. Davis,
L. G. Hosford,
Henry Howard,
A. L. Ware,
John Head,
C. E. Dyke,
Joseph Dean,
H. Palmer,
Cyrenius Gard,
Geo. McFarland,
Cicero Gard,
Philander Shipman,
Benj. Sonboy,
James A. Campbell,
J. H. Bramble,
Jos. M. Tolbert,
Thos. C. Tolbert,
Jas. H. Tolbert,
Wm. Gaime,
F. J. Jackson,
John Aaron,
Jos. C. Fentin,
John J. Smiley,
M. M. Adrick,
Thos. Whitworth,
Wm. Hicks,
H. R. Ramsay,
A. G. Chamberlain,
E. C. Tryon,
S. Taylor,
John E. Sapp,
J. G. Adams,
F. Marion,
Sarah Sapp,
Poei —— Wills,
D. W. Hartstock.
Thos. Ousley,
Jesse Long,
S. S. Thomas,
J. A. Thomas,
Wm. Yokem,
John Ward,
C. N. Bramble,
J. D. Gorton,
Moses Morey,
C. E. Moran,
C. M. Thurman,
Edwin Draper & Bro.,
Granville Bekhart,
D. Devol,
Smith Hail,
Wm. Wilson,
Wm. Pratt,
Calvin Neil,
Eli Seehorn,
Randolph Rable,
Jacob Turnbaugh,

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STATE OF ILLINOIS, } ss.
PIKE COUNTY, }

Aaron G. Chamberlain, being first duly sworn, on his oath says that he is one of the petitioners and subscribers to and named in annexed petition, and further says that he is the owner of land which will be included by the drains and lines described in said petition, and further says, that numerous other parties, whose names are attached to said petition, are owners of land also in the area to be included in draining and levying, as described in said petition; affiant also makes known to the County Court of Pike county, and state of Illinois, that he desires the prayer of said petition to be granted, and affiant states that he is acquainted

with the handwriting of a large portion of the signers of said petition, and knows from seeing a large number subscribe said petition, and that their signatures are true and genuine.

A. G. CHAMBERLAIN.

STATE OF ILLINOIS, } ss.
PIKE COUNTY. }

I, Wm. B. Grimes, Clerk of the County Court of said County, do hereby certify that Aaron G. Chamberlain personally appeared before me and was by me duly sworn as to the truth of the foregoing affidavit.

Given under my hand and seal, this 21st day of August. A. D. 1871.

WM. B. GRIMES,
County Clerk.

1 *h* SNY ISLAND LEVEE BONDS.

STATE OF ILLINOIS.

Act of Legislature, April 24, 1871, and Acts Amendatory Thereto. Probably referred to on page one, complainants' testimony, as

REGISTERED TEN PER CENT. BONDS.

INTEREST, JULY 1, ANNUALLY.

EX. "B" SHOWN MR. JONES.

INTEREST AND PRINCIPAL PAYABLE AT THE AGENCY OF THE STATE OF ILLINOIS IN NEW YORK, OR AT THE OFFICE OF THE STATE TREASURER AT SPINGFIELD, ILL.

JAMES WALSH.
Financial Agent.
OFFICE OF BALTIMOE AND OHIO RAILROAD, CHICAGO.

Detroit.
Union Steam Book and Job Printing Company.
1873.

2 *h* SNY ISLAND LEVEE BONDS.

STATE OF ILLINOIS.

Act of Legislature, April 24, 1871, and Acts Amendatory Thereto.

REGISTERED TEN PER CENT. BONDS.

Interest, July 1, Annually.

Interest and Principal Payable at the Agency of the State of Illinois in New York, or at the office of the State Treasurer at Springfield, Ill.

JAMES WALSH,
Financial Agent.
Office of Baltimore and Ohio Railroad, Chicago.

SNY ISLAND LEVEE REGISTERED BONDS.

3*h* These bonds are issued by virtue of an act of legislature for the construction and maintenance of a levee along the Mississippi river in the counties of Adams, Pike and Calhoun, of the state of Illinois. This levee commences at a point nine miles south of the city of Quincy, and extends southward along the river bank fifty-one and two-tenths miles, reclaiming to the property-owners of that locality one hundred thousand acres of the finest land in the state; a large portion of which is under high state of cultivation. The average value at present of the lands to be reclaimed by this levee is ten dollars per acre, and upon completion of the improvement said lands will undoubtedly be worth from fifty to seventy-five dollars per acre. Upon this point we refer to the letter of our attorney, Mr. Atkinson, who was especially instructed to make full enquiries upon the subject.

The act of the general assembly of the state of Illinois under which these bonds are issued relates to "*Drains and Levees*," approved April 24, 1871; and amendatory act "*To provide for the registration of drainage and levee bonds, and secure the payment of same*," approved April 9, 1872. It is founded upon a provision of the Constitution of Illinois that "The general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the land of others."

The commissioners appointed under provision of said act have fully complied with its requirements; are empowered to borrow the money necessary for the construction of this improvement, and are authorized to secure the payment of the same by notes or bonds, registered in the office of the auditor of public accounts for the state of Illinois, at a rate of interest not exceeding ten per 4*h* centum per annum, and which shall constitute a lien upon all lands reclaimed for the repayment of the principal and interest thereof.

These bonds are a series of $500,000.00 to be issued by the

Sny Island Levee Regis-tered Bonds.

Sny Island Levee Commissioners, under the authority and for the purpose above stated; they bear ten per cent. interest, and are payable as stated below.

The state of Illinois is custodian of all moneys collected for the construction of said improvement, and will apply same to the payment of accrued interest and the ultimate redemption of the bonds. The state, at the expiration of ten years, to commence the liquidation of these bonds at the rate of $50,000.00 each and every year thereafter until the entire issue is redeemed.

The interest and principal payable at the agency of the state of Illinois in New York city, or at the office of the state treasurer at Springfield, Illinois. Coupons payable annually on the first day of July, as above stated.

These registered bonds are unquestionably among the safest and best interest-paying securities now offered capitalists and others holding funds for investment. *They are undoubted security.*

The parties responsible for the completion of this levee are John Heffron, William Foxen, Edward Reidy, P. Fitzsimons, John Atkinson, William A. Moore and M. I. Mills, of Detroit. So that there can be no donbt but the work will be completed.

Certificate of Commissioners.

rtificate of mmissioners

The Contractors have received the following:

The undersigned, commissioners appointed by the county court 5 *h* of Pike County and State of Illinois, of which Hon. R. M. Atkinson is judge, to oversee and prosecute the improvement known as the Sny Island Levee, hereby certify that the island sought to be reclaimed, with the contiguous bottom lands, embrace a little more than one hundred thousand acres of land. The island is formed by the main current of the Mississippi upon the west side, and the Sny Cartee slough passing upon the east of it. At high water the Sny falls from the Mississippi and overflows the island and the adjacent portions of the main land. At low water it receives no flow from the Mississippi, and the supply of water is from small streams from the bluffs. The island and lands to be enclosed by the levee is fifty-one miles in length, and, with the adjacent bottom lands, from four and one-half to six miles wide.

The tmprovement is a levee fifty-one and two-tenths miles in ength, which cuts off the flow of water from the Mississippi into he Sny Cartee slough, and protects the island from overflow from

the river. This island at present is traversed by the Toledo, Wabash and Western, the Quincy, Alton and St. Louis, and the west branch of the Chicago, Alton and St. Louis railroads. Certificate Commissi

The number of acres to be redeemed by the improvement is a little more than one hundred thousand. We consider that without any levee, this land is worth from three to thirty dollars per acre; and when the levee is completed it will be worth from twenty to seventy-five dollars per acre—averaging about forty dollars per acre on the whole territory.

There is no opposition to the improvement; but, on the contrary, it is unanimously demanded by the owners of the land. Twenty miles of the levee is already completed, embracing the crossing of the Sny where it leaves the Mississippi at the upper point; and the upper bottoms are reclaimed. Only eighty-eight thousand dollars of bonds have been issued and paid upon the work. The whole of the assessment is five hundred thousand dollars, and the bonds will be issued only as the work progresses and are 6 *h* paid upon the relative estimates of the chief engineer as the work progresses; and ten per cent. is kept back to ensure the performance of the work by the contractors.

(Signed) WILLIAM DUSTIN,
GEORGE W. JONES,
JOHN G. WHEELOCK,
Levee Commissioners.

Pittsfield, Ill., December 14, 1872.

CERTIFICATE OF HON. RICHARD M. ATKINSON. Certificate Hon. Richa M. Atkinso

Judge County Court, Pike County, Ill.

This is to certify that I am judge of the county court of Pike County, Illinois.

Proceedings were instituted and prosecuted to their final termination in said court for the construction of the Sny Island Levee. Messrs. John G. Wheelock, of Adams County, and William Dustin and George W. Jones, of Pike County, were appointed commissioners under the drainage acts, approved April 24, 1871, and April 9, 1872; they accepted, were qualified, entered upon and are still exercising the duties of said office.

The object of said Levee is to redeem from overflow about one hundred thousand acres of land, known as the Sny Island and the adjacent bottom lands.

The assessments made to constitute a fund to prosecute the

ficate of Richard kinson.

work were made by a jury of twelve persons appointed by my court, and all the requirements of said drainage acts were carefully complied with.

The following is a brief summary of the proceedings had in this matter;

August 21, 1871—Petition filed by owners of lands.

September 18, 1871—Proof made of publication and posting notices. Prayer of petition granted, and John G. Wheelock, William Dustin and George W. Jones appointed commissioners.

September 23, 1871—Commissioners filed acceptance and 7 *h* official oath.

November 22, 1871—Commissioners file their report, and also that of their engineer, and continued for notice, etc.

December 18, 1871—Proof of publication and posting notices made. Report confirmed and jury ordered.

May 15, 1872—Summons ordered for jury of twelve.

May 22, 1872—Jury impanneled.

July 22, 1872—Assessment of jury filed, and continued to await appeals.

September 25, 1872—Assessment of jury confirmed, and ordered to be paid in ten annual installments, commencing in 1882.

October 23, 1872—Order entered authorizing the commissioners to borrow money and issue bonds.

I will further add, that, so far as I have been able to observe, there has been no hostility on the part of the owners of the lands to this improvement, but on the contrary they have afforded every degree of encouragement to the commissioners.

(Signed) RICHARD M. ATKINSON,
Judge County Court.

ficate of ty Court, Adams Co,

CERTIFICATE OF COUNTY COURT.
ADAMS COUNTY, ILL.

STATE OF ILLINOIS, } ss.
ADAMS COUNTY. }

I, George Brophy, clerk of the circuit court, and ex-officio recorder in and for said county, do hereby certify that the special

assessments made in the county of Adams aforesaid on account of the Sny Island Levee, as shown by a tabular statement of the same, which statement is certified to by the hand and seal of the clerk of the county court of Pike County, in the State of Illinois, and filed the 16th day of December, 1872, in the recorder's office of said Adams County, embraces the amount of four thousand one hundred and sixty-one 01.100 (4,161 01.100) acres of land, situated in said County of Adams, and that the total assessments on the same, 8*h* as therein shown, amounts to the sum of twenty-three thousand and sixty-seven 42-100 dollars ($23,067.42).

Witness my hand and official seal this 19th day of December, A. D. 1872.

SEAL OF CIRCUIT COURT, ADAMS CO., ILL.

(Signed) GEORGE BROPHY,
Clerk.
By CHAS. A. KENDALL,
Deputy.

CERTIFICATE OF COUNTY CLERK.
PIKE COUNTY, ILL.

STATE OF ILLINOIS, } ss.
COUNTY OF PIKE. }

This is to certify that the special assessment made in the County of Pike on account of the Sny Island Levee embraces, and, under the law and the proceedings of the county court of said Pike County, constitutes a lien upon eighty-nine thousand one hundred and sixty-eight 01.100 (89.168 01.100) acres of land in said county, and that the assessment in said county for benefits against said lands amounts in the aggregate to the sum of four hundred and fifty-nine thousand two hundred and fifty-two and 01.100 dollars ($459,252.01). This assessment is payable as follows, as appears from the records in my office: In ten equal payments—one-tenth in the year 1882, and one-tenth each year thereafter, and each bearing ten per centum interest, which is assessed and to be paid annually, and collected as the law directs.

I, William B. Grimes, clerk of the county court in and for Pike County, certify the foregoing to be true. Given under my hand and the seal of said county court, this 21st day of December, A. D. 1872.

SEAL OF COUNTY COURT, ADAMS CO., ILL.

(Signed) W. B. GRIMES,
County Clerk.

6. Pamphlet (yellow) Exhibit B, except (a) copies of laws 1871 and 1872. (b) Report of Cortheil and (c) certificates of Auditor.

(Memo. Clerk will please enter these in the printed record and state that they are already printed in blue pamphlet A.)

[Extract from stipulation of Counsel printed on page 501.]

[Laws 1871 and 1872 can be found on page 394.]

tificate of unty Clerk. houn Co.

CERTIFICATE OF COUNTY CLERK.
Calhoun County, Ill.

STATE OF ILLINOIS, } ss.
CALHOUN COUNTY, }

This is to certify that the special assessment made in the
9 *h* County of Calhoun on account of the Sny Island Levee embraces and constitutes a lien upon seven thousand six hundred and ninety 54.100 acres of land in said Calhoun County, as appears from certified copy of assessment roll filed in my office, and that the assessment in said county for benefits to said lands amounts in the aggregate to the sum of twelve thousand seven hundred and seventy-one dollars ($12,771.00), as appears from said assessment roll.

Given under my hand and the seal of the county court of said Calhoun County hereto affixed, at my office in Hardin, this 18th day of December, A. D. 1872.

SEAL OF COUNTY COURT, CALHOUN CO., ILL.

(Signed) JOHN F. NOLTE, Clerk.

al Opinions

LEGAL OPINIONS.

DETROIT, Feb. 25, 1873.

JOHN HEFRON, Esq.:

Dear Sir: I have examined carefully the proceedings prelim-
10 *h* inary to the issue of the Sny Island Levee Bonds.

By the Act of April 24, 1871, *owners* or occupants of land desiring to construct drains or ditches across the lands of others for agricultural or sanitary purposes, may file a petition in the County Court, setting forth the necessity of the same and its route, and whether a levee is necessary, and may pray for the appointment of Commissioners—See Section 1.

1. The persons petitioning must be land owners or occupants.
2. The improvement must be for agricultural or sanitary purposes.
3. The proposed improvement must be fully described.

I find that on the 21st of August, 1871, a petition was filed in the County Court of Pike County by John Morris and more than a hundred others, *owners* and *occupants* of lands to be affected, namely, a

large extent of bottom lands, subject to the overflow of the Mississippi river, and asking for the improvement by levees for agricultural and sanitary purposes, and setting forth very fully the facts showing the necessity of such an improvement to reclaim a rich and valuable tract of land.

It also fully describes the improvement and prays for the appointment of Commissioners.

In my opinion it is in full compliance with the law.

Upon the filing of this petition the petitioners are required by section two to give a notice stating –

1. When and in what court the petition is filed.
2. The starting point, route and terminus of the proposed drain or levee.
3. Whether a levee is proposed.
4. At what term the petition will be heard.

A notice dated August 1, 1871, signed by six of the petitioners and others, and by W. A. Grimshaw, their Attorney, was given. It states substantially what is required by section two, and would be considered a compliance with it.

11 *h* The same section requires that the notice should be published for two weeks in a newspaper in the County where the proceedings are had.

It was so published, as appears by the printer's certificate, in the Pike County *Democrat*.

This certificate is made evidence by the general statutes of Illinois.

It is also to be posted in three of the most public places in each township.

The law provides no way for preserving the evidence of such posting and it would probably have to be proved as a fact by testimony *dehors* the record.

An affidavit is on file, made by Charles N. Clark, showing the posting as required; and the court in afterwards passing upon the petition, finds specially all the facts essential to its jurisdiction.

This finding brings it within the principles that when the jurisdiction depends upon a fact to be found or ascertained by the court, and the fact is asserted in the record of its proceedings, such finding shall be deemed conclusive in all collateral actions between the parties to such proceeding.

See Dyckman *vs.* the Mayor of N. Y., 1 Seld. 434.
Sheldon *vs.* Wright, 1 Seld. 497.
McCarthy *vs.* Marsh, 1 Seld. 263.
Buel *vs.* Trustees, etc., 4 Seld. 55.
2 Phillipps Ev. 339.
C. and H. Notes, chap. 5, sec. 1.

Opinions

A hearing was regularly had at the September term, 1871, and the commissioners appointed.

By section five, if it shall appear to the court that the proposed drain * * or levee is necessary or will be useful for the drainage of the lands proposed, etc., the court shall so find.

And the court does find the levee to be necessary and useful for the purposes named.

September 23, 1871, the commissioners accepted their appointment and took the oath required by section six.

As appears by their own record and by the subsequent proceedings, William Dustin was elected Chairman and Geo. W. Jones, Secretary.

November 23, 1871, they filed their report, showing an examination as required by section nine of the lands proposed to be drained and leveed, and reporting favorably upon the route, cost, etc., as required by the divisions of that section. Their report refers to the report of Engineer, which is on file and which is 12 *h* very full.

The commissioners find that the proposed work can be done at a cost and expense not exceeding the benefits, and therefore caused surveys, etc., to be made as required by section eleven.

This report having been filed, section thirteen requires a notice stating—

1. The time of filing such report.
2. Upon what day application will be made for its confirmation.

This notice is to be given as required by section two.

1. By publication in a County newspaper.
2. By posting in three of the most public places of each Congressional township.

This notice was given and is in full compliance with the law.

The certificates of the printers show its publication in *The Old Flag* and Pike County *Democrat*.

And the court finds that proper notices were given both by publishing and by posting.

December 18, 1871, the report was confirmed by the court, and a venire issued for a jury to make the assessment.

The jury was summoned and took the oath required by section sixteen, elected a foreman and proceeded as provided by section seventeen to assess the damages and benefits.

They then fixed upon July 15, 1872, to meet as a jury before Justice Mansfield, to hear objections.

Section twenty provides for a notice of this meeting—

1. By posting in three places in each Congressional township.

2. By publication in a County newspaper.
3. By mailing a copy to each owner or occupant of land allowed for damages whose name and residence is known to the commissioners.

On the day appointed the jury meet, and they certify to the giving of the notice as required, and the making of such corrections as to them seemed just.

The notice is on file, and the affidavit of Geo. W. Jones to the mailing of the notices in Pike County, and the affidavit of posting and mailing, by Charles N. Clark, along the whole line.

The printer's certificate shows the notice was properly published.

July 22, 1871, the commissioners filed the assessment roll, and ask for its confirmation.

Two appeals were taken, as appears by the files, and are undermined. As to all others, the assessment was confirmed and spread upon the records.

By section twenty-seven the court, at the time of confirming the report on assessments of the jury, may direct the assessment for benefits to be paid in installments, at such times as will be convenient for the accomplishment of the proposed work.

The court, in confirming the report directed the assessment to be paid in ten annual installments, commencing in 1882, and that annual interest at ten per cent be collected until that time.

By section thirty-five the commissioners are authorized to borrow money not exceeding in amount the amount of the assessment unpaid at the time of borrowing, and secure the same by *bond*, bearing interest at ten per cent per annum, and not running beyond one year after the last assessment; and the bonds so issued constitute a lien upon the assessment for the repayment of the principal and interest.

The original act seemed to contemplate that the commissioners themselves might collect the tax, or, by certifying the assessment to the county clerks, have the taxes collected like State taxes.—See Section 29.

By a supplemental act of April 9, 1872, the bonds are to be registered at the office of the Auditor of Public Accounts under certain restrictions.

The bonds under examination have been so registered.

At the same time a copy of the assessment roll is filed with the auditor, which has been done; and a copy of the assessment roll, so far as the same relates to lands in each county, is filed with each county clerk, and then the assessment is to be collected like State taxes.

Opinions

The auditor is required to forward to the several county collectors a statement of the amount required to pay interest each year and to insure the payment of principal, and the taxes are to be collected and paid into the State Treasury.

The State becomes the custodian of the sums so collected, and applies them in payment of the bonds in the same manner as the State debt is paid.

Under the original act, section thirty-five, the commissioners might borrow money without permission of the court.

Section two of the supplemental act, seems to contemplate an order authorizing them to borrow money.

October 22, 1872, such an order was made by the court.

I am of opinion that the bonds are valid.

Yours truly,

JOHN ATKINSON.

Colonel Atkinson has read to me copies of the proceedings in the Pike County Circuit, relative to the Sny Islands Bonds, and I have also examined the Acts of the Illinois Legislature, approved April 24th, 1871, and April 9th, 1872.

I fully concur in the foregoing opinion of Colonel Atkinson.

In my opinion, all that is necessary to give the bonds entire validity is, that it shall appear that the Pike County Court obtained full jurisdiction, and that the subsequent proceedings resulted in a final judgment of confirmation.

That such jurisdiction was obtained, and final judgment rendered, is fully shown. This judgment created a perfect lien on the lands benefited, and this lien stands as a security for the bonds.

GEO. V. N. LOTHROP.

Detroit, Feb. 26th, 1873.

Report of Atkinson.

The following is a report as to the value of the lands:

JAMES WALSH, ESQ., Chicago,

Dear Sir:—At your request, I made a careful examination of the lands reclaimed by the Sny Island Levee, and diligent inquiry as to their value. The crops now growing upon the reclaimed lands surpass any I saw in Illinois. On inquiry among the farmers I found they held the land at from $50 to $100 per acre.

The bankers at Hannibal, just opposite, on the Mississippi, and at Pittsfield, the county seat of Pike County, estimate its *cash* value at an average of $30 per acre.

Parties may refer to Judge Higbee, President of the First National Bank at Pittsfield. Judge Atkinson, connected with the Pike County Bank, Pittsfield. Hon. Josiah Hunt, President First National and Mayor of Hannibal, and W. A. Hunt, Cashier of the Savings Bank at Hannibal. Report of John Atk

These gentlemen are well acquainted with the location, and are men of the highest standing and no way interested in the sale of bonds. Judge Atkinson is the largest land-holder as I am informed on the lands to be reclaimed. I talked also with Mr. James Irving, a prominent lawyer at Pittsfield, and the owner of two thousand acres of these lands. He placed the actual cash value of the lands at $30 per acre, although he says owners ask much more. I am satisfied this is a fair estimate.

Yours truly,

JOHN ATKINSON.

Detroit, Sept. 1, 1873.

Zephaniah T. Webster
vs.
The People, &c. } Appeal from Pike.

Opinion *Per Curiam:*

11 The principal questions raised and discussed in this case are the same as in Updike, et al., vs. Wright, decided at the present term and for an expression of our views reference is made to the opinion in that case. For the reasons there given the judgment in this case will be reversed and the cause remanded. Opinion in Webster C

Judgment reversed.

I, E. A. Snively, Clerk of the Supreme Court, State of Illinois, do hereby certify the foregoing to be a true copy of the opinion of the Supreme Court, State of Illinois, in a certain cause heard and determined as of January term of said court, in the year of our Lord one thousand eight hundred and seventy-six.

In testimony whereof I hereunto set my hand and affix the seal of said court at Springfield, this 26th day of October, A. D. 1889.

[SEAL]

E. A. SNIVELY,
Clerk Supreme Court.

Webster vs. The People. Copy of Opinion. Exhibit in O'Brien v. Wheelock.

THOS. H. CHEENEY,
Special Master.

Withdrawal of Matthews Signature

STATE OF ILLINOIS, } ss.
COUNTY OF PIKE. }

Office of the County Clerk of said County,
August 29, A. D. 1895.

I, V. A. Grimes, clerk of said court, do hereby certify that at a term of said court, held on the 16th day of January, A. D. 1875, in the matter of the petition of C. N. Clark, et al., for an additional assessment of benefits for levee purposes, there was made and entered of record in said court on said day, among other things, an order, of which the following is a copy:

County Court of Pike County, Illinois.
Of January Term, A. D. 1875.

In the matter of the petition of }
C. N. Clark & others. }

And now on petition of A. C. Matthews his prayer is granted to allow him to withdraw his name from the petition herein, and it is treated as if not signed by him.

(Signed) STROTHER GRIGSBY,
Co. Judge.

And thereupon, by force of such order, the name of said A. C. Matthews was stricken from the petition filed by said C. N. Clark, et al., which order will be found on Probate Order Book, Vol. 18, at page 433.

In witness whereof I have hereunto set my hand and affixed the seal of this court.

[SEAL] V. A. GRIMES,
County Clerk.

Ex. introduced Aug. 29, 1895.
Petition of A. C. Matthews.

569. Greene, et al., }
to
Jones, et al. }

Deed of Trust Recorded Aug. 25, 1877.

This indenture made and entered into this 15th day of March, A. D. 1877, between DeWitt Greene and Caroline, his wife, Michael Strubinger and Mary A., his wife, William Grammar and Mary M., his wife, John R. Howand and Susannah, his wife, Anna J. McTucker, Douglass Davis and Jesse F., his wife, Charles E. Davis and Eliza Jane, his wife, James McLucker and Mary, his wife, and George W. Jones, John G. Wheelock and B. F. Westlake, commissioners appointed by the county court of Pike County, Illinois, under and by virtue of an act of the General Assembly of the State of Illinois to provide for the construction and protection of drains, ditches, levees and other work approved April 24th,

A. D. 1871, and the amendments thereto and their successors in office, parties of the second part, witnesseth: That the said parties of the first part for and in consideration of the sum of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations hereinafter mentioned, hereby remises, release and quit claim unto the said parties of the second part and their successors in office as trustees in trust for the purpose hereinafter mentioned, all our right, title and interest in so much of the following tracts of land, situate in Adams and Pike Counties, Illinois, as are subject to overflow according to plats and maps of survey of swamp and overflowed lands returned by E. L. Corthell, Chief Engineer, to and now on file in the office of the Sny levee commissioners at Pittsfield, and each severally for himself as follows:

Copy of Deed, May 25,

The North West quarter of section thirty-four (34), township four (4), South range seven (7) West and the North West quarter of section four (4), township five (5), south range seven West by DeWitt Greene.

2 *k* The east half of the south east quarter of section thirty (30) and the north half of section thirty-one (31), in township five (5), south range six (6) west, and the south east quarter of section thirty-six (36), township five (5), south range seven (7) west owned by said Green and Strubinger. The west half of the north east quarter of section thirty-six (36). Sixty-five acres off the north end of the west half of the south east quarter of section thirty-six (36) and sixty-six acres off the north end of the east half of the north east quarter of section thirty-six (36), all in township four (4), south range eight (8) west, and one hundred and seventy-four acres off the north side of the north west quarter of section thirty-one (31), township four (4) south, and range seven (7) west, owned by William Grammar and the heirs of John McTucker, deceased. One hundred and twenty-two acres off the west side of the south west quarter of section thirty (30), in township five (5) south, range six (6) west, and thirty-two acres in the south east corner of the north east quarter of section thirty-six (36), township five (5) south, range seven (7) west, owned by M. Strubinger.

The east half of the south east quarter of section No. thirty-six (36) and thirteen and one third acres off the south end of the east half of the north east quarter of section thirty-six (36) in town (No. 4) four south, and in range (No. 8) eight west; also the west third of the south west quarter and thirteen and one-third acres off south end of the west third of the north west quarter of section thirty-one (31) in town (No. 4) four south, and in range (No. 7)

Trust recorded 1877. seven west, owned by A. G. Chamberlain and containing in all one hundred and eighty-eight acres.

To have and to hold the same with the appurtenances thereto
3 *k* belonging unto the said parties of the second part and their successors in office forever, and the said parties of the first part hereby demise and release all right of homestead exemption, they now or hereafter may have to said lands respectively under any law of this state. Provided, however, that this conveyance is upon the conditions and for the purpose following, to-wit: Whereas the said drainage commissioners under the act aforesaid have constructed a levee on the east bank of the Mississippi, in the counties of Adams, Pike and Calhoun, in length about fifty-two (52) miles, for the purpose of reclaiming from inundation the lands subject to overflow from the high water of said river, and attempted to provide the funds necessary to pay for the same and all necessary repairs by certain assessments levied upon the lands to be reclaimed, and whereas the Supreme Court of this state has declared said assessments to be void, and said commissioners are wholly destitute of funds with which to repair said levee, or to keep the same in repair, and whereas the act aforesaid makes it the duty of said commissioners to protect said levee and keep the same in repair, therefore we, the above named grantors, the owners of lands subjected to overflow and attempted to be reclaimed by said levee, deeming it to be our interest to voluntarily furnish funds to repair and keep in repair so much of said levee as lies north of the point where said levee going south leaves or starts from the Louisiana Branch of the Chicago, Alton and St. Louis Railroad, do declare this deed to be upon these conditions.

1. For the purpose of assessment said overflowed district shall be divided as follows: All lands lying north of the north line of township seven (7) south and of range five (5) and six (6) west
4 *k* shall constitute class No. 1. All other lands lying south of said line shall constitute class No. 2, and said trustees shall annually assess upon the lands embraced in this deed and classified above as follows: Upon lands in class No. 1 a sum not exceeding fifty cents per acre, and in class No. 2 a sum per acre not exceeding two-thirds of the amount assessed upon lands in class No, 1; and all assessments in the same class shall be uniform, and said sum of money when collected shall constitute a fund in the hands of said commissioners for the reparation and restoration of said levee and for the other purposes herein mentioned.

2. When an assessment has been made, said trustees shall cause a general notice to be given in one newspaper published at

the county seat of each of said counties of Adams and Pike and in the city of Hannibal in the following form substantially: Copy of Deed, May 25,

Sny Levee Assessment. The undersigned trustees have by virtue of the powers granted them in and by certain deeds of trust executed to them by the owners of lands on the Sny bottom, made an assessment for the year A. D. 18.... upon the lands mentioned in said deeds of trust as follows: Upon all lands in class No. 1 the sum of .....cents per acres; upon all lands in class No. 2 .... cents per acre, and notice is hereby given that unless the assessment so made upon said land shall be paid to the trustees on or before the .....day of..... next, the lands so in default will be advertised and sold according to the provision of said deeds of trust. Dated this ..... day of..... A. D. 18....

.....
.....
.....
Trustees.

Which notice shall be published for three weeks successively 5 *k* in said newspapers and the last publication shall not be less than three months before the date of payment named in said notice.

3. If the assessment so made or any part thereof shall remain unpaid after the day named in said notice the said trustees or the survivor or survivors of them or heir successors in office shall proceed to sell each tract of land upon which such assessment remains unpaid or so much thereof as shall pay such assessments and costs and where assessments shall be unpaid two or more tracts of land belonging to the same individual said trustees may in their discretion sell any one tract or part of the tract for the amount due upon all. All such sales shall be at public vendue at the Court house in Pittfield, Illinois, and after notice given for four weeks by publication in one newspaper published in each of said counties in which any of the land to be sold shall lie and in the City of Hanibal which notice shall state the amount of assessment due the tract of land upon which due for what year levied and the time and place of sale. And if any tract of land when offered for sale shall not bring the amount of assessment due upon the same with costs of sale the said trustees shall not sell said land for less than the amount due upon the same but may offer the same for sale from time to time after like notice adding subsequent assessment and cost to the final day of sale.

4. Upon such sale being made said trustees shall execute to

of Trust Recorded 1877.

the purchaser or purchasers a deed to the land so sold which shall convey to the purchaser all the right, title and interest of the person or persons conveying said land to said trustees.

5. Said trustees are hereby authorized and empowered to
6 *k* borrow money for a term not exceeding two years and in amount not greater than two years assessments and to pledge and guarantee the payment of the same with interest and at or before the time of such borrowing if they deem it advisable they may make an assessment large enought to repay the sum borrowed or to be borrowed within the time for which borrowed and amounting to one or more annual assessments not exceeding two but the assessments made shall be payable in annual installments not exceeding the annual rate herein authorized to be levied but the parties of the first part hereby restrict said trustees from creating any personal liabilities upon them, it being understood and intended that their power in this respect does not extend beyond the assessments and sales aforesaid.

6. No sale of lands for non-payment of assessment shall release the premises so sold from liability for future assessments, but the lien created by this deed shall extend to all future assessments notwithstanding such sale and deed. And all deeds made by the trustees shall contain a statement of such liability to future assessments.

7. It is expressly *understood* that this deed is not to be binding on the grantors until at least thirty thousand acres of lands in said overflowed district conveyed in good faith and subjected to the payment of all assessments on the same, are embraced in this or other deeds of trust with similar conditions and provisions executed to the same trustees and their successors in office and for the same purpose. And it shall be the duty of the trustees with the moneys arising from assessments upon such lands and other lands that may be hereafter conveyed to them by similar deeds to restore and keep in repair said levee from its commencement in Adams County to the point where said levee going South leaves or starts from the Louisiana Branch of the Chicago, Alton and St. Louis Railroad and no part of said money shall be expended South of said last named point.

7 *k* 8. Deeds executed by the trustees on sale for nonpayment of assessments shall be conclusive evidence that all the prerequisites of a valid sale have been complied with, and no defense shall be allowed to defeat the title thereby conveyed except proofs of the payment of such assessments for which sale was made before the making of such sale.

9. It shall be the duty of said trustees in making repairs of the said levee during the fall of 1876 and winter of 1876 and 1877 either by themselves, their agents, servants or by contract to permit and provide that the owners of land shall be allowed to work out their assessments in making said repairs under the direction of the party or contractor having such work in charge at the same price that such person or contractors shall pay others in cash for similar work and the person having such work in charge shall give to the person so working a receipt or certificate for such work the amount thereof in dollars and cents which shall be received by the trustees on account of any assessments then made on the lands owned by such persons. And any person whose name is subscribed to such deed of trust who during the fall of 1876 or since has or shall hereafter furnish money, materials or labor to aid in the reparation of said levee shall be entitled to the like credit on his assessments.

Copy of T
Deed, Rec
May 25, 1

10. All money arising under this deed of trust by assessments shall be used exclusively to carry into effect the object of this deed, and in no case shall any part thereof ever be applied 8 *k* to the payment of any indebtedness created by or on account of the original construction of said levee.

11. The repairs intended by the parties to this deed shall extend to and embrace the widening and deepening of any canal, slough or stream north of the point designated on the Louisiana branch of said railroad or removing obstructions therefrom which shall be deemed necessary by said commissioners to the complete reclamation of said lands from overflow.

12. Said commissioners may use money arising from assessment for the purpose of compromising suits and controversies, employing agents and attorney, paying damages in procuring the right of way and in protecting said levee, whenever in their opinion it may be necessary to carry out the objects of this deed and to defend and prosecute with the funds in their hand all law suits affecting the interests of said landowners generally and to do and perform all other acts and things necessary and proper for insuring, maintaining and defending the common interests of said land owners.

13. Said trustees shall be allowed the sum of two dollars for each deed made by them under the provisions hereof and the sum of fifty cents for each tract of land sold and the costs of advertising in the sale of land, shall be divided pro rata among the tracts advertised and all to be paid by the purchaser.

14. After this deed shall go into effect the same shall not be

of Trust
d, Recorded
, 1877.

rescinded or any one released from his signature thereto or any tract of land released from the lien thereof except upon the vote of persons owning at least two-thirds of the number of acres of the lands represented and named in these deeds of trust to be expressed at some meeting called by the trustees for that purpose for which 9 *k* notice for two weeks shall have been given by publication by one newspaper in each of the counties of Adams and Pike and the City of Hannibal in which the object of said meeting shall be stated. Where and when if persons owning and representing two-thirds of the number of acres of said lands shall vote in favor of cancelling this deed of trust or releasing any person or tract of land from the effect and lien thereof, it shall be the duty of the trustees after the payment of existing debts to release this deed by entry on the margin of the record thereof or other proper discharge in full or partially according to the nature of such vote.

15. In addition to the bond required of said commissioners by law they shall before entering upon the discharge of their duties under this deed enter into a bond in the penal sum of five thousand dollars each payable to the County Judge of Pike County and his successors in office for the use of all persons interested therein with good and sufficient securities to be approved by said Judge conditioned for the faithful discharge of their duties as trustees under this deed of trust.

16. If the said office of commissioners under the drainage law of this state shall at any time for any reason become wholly vacant such vacancy shall not effect the rights of said trustees under this deed, but said trustees shall still continue to discharge all the duties hereby contemplated and in case the Judge of the County Court has now power or refuses to fill such vacancy and a vacancy in the office of trustee occur by removal from the state, death, resignation, refusal to act, or any other cause or disability, it shall be lawful for the judge of the Circuit Court of Pike County, Illinois, either 10 *k* in term time or vacation, upon the petition of persons owning one thousand acres of land embraced in said deeds of trust, to appoint one or more trustees to fill said vacancies, and it is especially understood that the acceptance of the office of trustee under the deeds of trust shall not debar such trustee of the right of resignation of said office, but such resignation or removal shall not release said trustee from any liability for any cause prior to the date of such resignation or removal.

17. Two trustees under this deed of trust shall constitute a quorum and all official acts done by them shall be as valid as if done by all three of said trustees.

In testimony whereof the said parties of the first part have hereunto set our hands and seal this 15th day of March, 1877.

Copy of T
Deed, Rec
May 25, 1

Witness:
ASA TURNER.

DEWITT GREENE	(Seal.)
CAROLINE GREENE	(Seal.)
MICHAEL STRUBINGER	(Seal.)
MARY A. STRUBINGER	(Seal.)
WILLIAM GRAMMAR	(Seal.)
MARY M. GRAMMAR	(Seal.)
SUSANNAH ROWAND	(Seal.)
JOHN R. ROWAND	(Seal.)
JOHN J. MCTUCKER	(Seal.)
JESSIE F. DAVIS	(Seal.)
DOUG. DAVIS	(Seal.)
CHARLES E. DAVIS	(Seal.)
ELIZA JANE DAVIS	(Seal.)
JAMES MCTUCKER	(Seal.)
MARY MCTUCKER	(Seal.)
A. G. CHAMBERLAIN	(Seal.)
GLAPHYRA CHAMBERLAIN	(Seal.)

STATE OF ILLINOIS, } ss.
COUNTY OF PIKE. }

Before me the uudersigned, C. S. Allen, a justice of the peace within and for the county aforesaid, came DeWitt Greene, Caroline Greene, Michael Strubinger, Mary A. Strubinger, William Grammar, Mary M. Grammar, John R. Rowand, Susannah Rowand, Anna J. McTucker, Douglas Davis, Jessie F. Davis, Charles E. Davis, Eliza J. Davis, James McTucker, Mary McTucker, 11 *k* Asa G. Chamberlain and Glaphyra Chamberlain, who are personally known to me as the real persons by whom and in whose names the above conveyance was executed and by whom and in whose names the same is proposed to be acknowledged and who then severally acknowledged their signature thereto to be their free and voluntary act and deed for the purpose of waiving and releasing all right, title and interest in and to said land by virtue of the homestead and exemption law of said state, and for all other purposes therein expressed, and the said Caroline Greene, wife of DeWitt Greene, Mary E. Strubinger, wife of Michael Strubinger, Mary M. Grammar, wife of William Grammar, Susannah Rowand, wife of John Rowand, Anna J. McTucker, Jessie Davis, wife of Douglass Davis, Eliza Davis, wife of Charles E. Davis, Mary McTucker, wife of James McTucker, and Glaphyra

of Trust Recorded 1877. Chamberlain, wife of Asa G. Chamberlain, being by me first examined separate and apart from their said husbands, and the contents of said conveyance being first made known to them, acknowledged that free and voluntarily without any compulsion or coercion from their said husbands, they executed the same and forever released and waived all right, interest or title to said real estate by virtue of the homestead exemption laws of said state relinquished all their rights to the claim of dower in and to the land and tenements in said conveyance described, and sold, transferred and conveyed all their title in fee simple, or right by inheritance in and to the real estate aforesaid and that do not wish to retract.

Given under my hand and official seal this 15th day of March, 12 *k* in the year of our Lord one thousand eight hundred and seventy-seven.

CHARLES S. ALLEN, J. P. (Seal.)

Recorded May 25th, A. D. 1877, at 4 o'clock P. M.

STATE OF ILLINOIS, } ss.
PIKE COUNTY. }

CIRCUIT CLERK'S CERTIFICATE OF COPY.

I, Geo. W. Archer, Clerk of the Circuit Court, within and for said County and State aforesaid, do hereby certify the foregoing to be a full, true and complete copy of certain Deed of Trust, executed by Dewitt Green et al. to Geo. W. Jones, John G. Wheelock and B. F. Westlake, (Trustees) and recorded in Volume 24 of Mortgage Records of Pike Co., Ills., at pages 359 to 366 inclusive.

In testimony whereof, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Pittsfield, Illinois, this 10th day of October, A. D. 1891.

GEO. W. ARCHER,
[SEAL] Circuit Clerk.

Ex. No. 7.—Thos. H. Cheeney. Dewitt Green et al. to Geo. W. Jones et al.

Copy of Sny Island Levee Bond

UNITED STATES OF AMERICA.

No. 6. $500.

SNY ISLAND LEVEE BOND.

STATE OF (Ten per cent interest bond. ILLINOIS.

1/ The Commissioners appointed by the County Court of Pike County and State of Illinois, on the petition of John Morris and others to locate and construct a levee on the Mississippi river in the Counties of Adams, Pike and Calhoun, by virtue of an act of the General Assembly of the State of Illinois, entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," and by power vested in them by said act acknowledge themselves, as such commissioners, held and firmly bound unto John G. Wheelock or bearer in the sum of Five Hundred Dollars, lawful money of the United States, payable in the City of New York, at the Bank or Agency, used by the Treasurer of the State of Illinois, on the first day of October, A. D. 1882, with interest at the rate of ten per cent per annum, interest payable on the first day of July in each year on the surrender of annexed coupons as severally due.

This bond is one of a series of Five Hundred Thousand Dollars issued for the purpose aforesaid and after an order of the County Court of Pike County aforesaid approving of the assessment made by a jury of the cost of said levee.

In witness whereof, the said commissioners have caused the seal of said commissioners to be attached hereto, and the same to be attested by their chairman and secretary and have also 2/ caused the signature of their secretary to be affixed to the coupons annexed. Dated this first day of October, A. D. One Thousand Eight Hundred and seventy-two.

WM. DUSTIN,
Chairman.

SNY ISLAND LEVEE ILLINOIS COMMISSIONERS.

GEO. W. JONES,
Secretary.

Annual Interest Coupons in the following form were attached to each bond when issued.

land Bond. No. 6. $50 00/100

SNY ISLAND LEVEE BOND.

INTEREST COUPON.

Treasurer of the State of Illinois will pay to bearer July 1st Fifty Dollars,
being interest on bond numbered as above.

GEO. W. JONES.

AUDITOR'S OFFICE, ILLINOIS.

Springfield, Nov. 12, 1872.

3 *l* I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same," approved April 9th, 1872, and in force July 1st, 1872.

In testimony whereof I hereunto subscribe my name and affix the seal of my office at Springfield the day and year first above written.

C. E. LIPPINCOTT,
Auditor Public Accounts.

{ AUDITOR'S OFFICE ILLINOIS. }

State of Illinois. Sny Island Levee Bond. $500. No. 6. Ten per cent Bond.

Issued under an Act of the Legislature of Illinois dated April 24th, 1871, and Amended Act to Register Bonds April 9th, 1872.

Principal and Interest Payable at the Agency of the State of Illinois in New York City or at the office of the State Treasurer at Springfield, Ill. Interest payable July 1st.

A true copy.

JOHN M. PALMER.

UNITED STATES OF AMERICA.

No. 606. $1000.

SNY ISLAND LEVEE BOND.

1 *m* State of (Ten Per Cent. Interest Bond) Illinois.

The commissioners appointed by the County Court of Pike County, and State of Illinois, on the petition of John Morris and others to locate and construct a levee on the Mississippi River, in the Counties of Adams, Pike and Calhoun, by virtue of an act of

the General Assembly of the State of Illinois, entitled "An act to provide for the construction and protection of drains, ditches, levees and other works" and by power vested in them by said act acknowledge themselves as such commissioners held and firmly bound unto J. G. Wheelock or bearer in the sum of One Thousand Dollars, lawful money of the United States, payable in the City of New York at the Bank or Agency used by the Treasurer of the State of Illinois on the first day of July A. D. 1892, with interest at the rate of ten per cent. per annum, interest payable on the first day of July in each year on the surrender of annexed coupons as severally due. This bond is one of a series of One Hundred and Fifty Thousand Dollars issued for the purpose aforesaid after an order of the County Court of Pike County aforesaid, approving of the assessment made by a jury for the cost of said levee.

Copy of Sny Island Levee Bond

In witness whereof the said commissioners have caused the seal of said commissioners to be attached hereto and the same to be attested by their chairman and secretary and have also caused the signature of their secretary to be affixed to the coupons annexed. Dated this first day of March A. D. One Thousand Eight Hundred and Seventy-five.

2 m

B. F. WESTLAKE,
Chairman.
GEO. W. JONES,
Secretary.

{ SNY ISLAND LEVEE ILLINOIS COMMISSIONERS. }

Annual Interest Coupons in the following form were attached to each bond when issued:

No. 606. $100.00

Sny Island Levee Bond.

Interest Coupon.

Treasurer of the State of Illinois will pay to bearer July 1st.

One Hundred Dollars.

Being interest on bond numbered as above.

GEO. W. JONES,
Secretary.

AUDITOR'S OFFICE—ILLINOIS.

3 *m* SPRINGFIELD, March 1st, 1875.

of Island vee Bond.

I, Charles E. Lippincott, Auditor of Public Accounts for the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to provide for the registration of drainage and levee bonds and to secure the payment of the same," approved April 9th, 1872, and in force July 1st, 1872.

In testimony whereof, I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

{ AUDITOR'S OFFICE, ILLINOIS. } C. E. LIPPINCOTT, Auditor Public Accounts.

State of Illinois, Sny Island Levee Bond, $1,000. No. 606. ten per cent Bond.

Issued under an act of the Legislature of Illinois, dated April 24th, 1871, and Amended Act to Register Bonds, April 9th, 1872.

Principal and interest payable at the Agency of the State of Illinois, in New York City, or at the office of the State Treasurer, at Springfield, Ill. Interest payable July 1st.

A true copy. JOHN W. PALMER.

ve to Substute Copy of swer of Commissioners for ginal.

And afterwards, to-wit, on the 5th day of November in the 2254 June Term of said Court in the year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael O'Brien, et al., Complainants, vs. John G. Wheelock, et al., Defendants. } In Chancery.

On moton of complainants by their solicitors leave is granted to substitute a copy of the answer of the commissioners for the original answer which is mislaid or lost.

On further motion of complainants by their solicitors leave is granted them to file an amendment to the bill of complaint herein, alleging that the complainants purchase the bonds in controversy from the contractors instead of the commissioners.

Then afterwards, to-wit, on the 6th day of November in the June Term of said Court in the year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit: Leave to stitute C Answer missions O

Michael O'Brien, et al., Complainants,
vs. In Chancery.
John G. Wheelock, et al., Defendants.

Now on this day came all the defendants now represented of record by Messrs. Greene & Humphrey, A. C. Matthews, Thomas A. Worthington and Harry Higbee, and also all defendants now represented of record by A. G. Crawford and on their motion entered by their said counsel and solicitors the answers of each and all said defendants hereto filed are extended to all 2255 amendments to the original bill of complaint not heretofore answered by them respectively. Order Ex ing Ans Amendm

And afterwards, to-wit, on said 6th day of November in the Term and year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record to-wit:

Michael W. O'Brien, et al., Complainants,
vs. In Chancery.
John G. Wheelock, et al., Defendants.

This day this cause came on for final hearing on the pleadings and proofs and after argument of counsel in part, the further argument is postponed until to-mororw morning. Hearing Cause, N

Then afterwards, to-wit, on the 7th day of November in the Term and year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael W. O'Brien, et al., Complainants,
vs. In Chancery.
John G. Wheelock, et al., Defendants.

This day came again the parties by their solicitors and after additional argument the further hearing of this cause is postponed until to-morrow morning. Hearing Cause No

Now afterwards, to-wit, on the 8th day of November in the term and year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael W. O'Brien, et al., Complainants,
vs.
John G. Wheelock, et al., Defendants.
} In Chancery.

ing of e Nov 8 1895. 2256 This day come again the parties by their solicitors and after additional argument the further hearing of this cause is postponed until to-morrow morning.

Afterwards, to-wit, on the 9th day of November in the term and year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael W. O'Brien, et al., Complainants.
vs.
John G. Wheelock, et al., Defendants.
} In Chancery.

ing of e Con- ed and t under sement, ov. 9, 1895. This day come again the parties by their solicitors and the Court having heard the remainder of the argument of counsel takes this case under advisement.

Decree ssing Bill Then afterwards, to-wit, on the 10th day of February in the January Term of said County in the year of our Lord One Thousand and Eight Hundred and Ninety-seven, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

Michael W. O'Brien, Francis F. Palms and Clothilde Palms, Executors of the last will and testament of FrancisPalms, deceased, and Albert Blair,

against

John G. Wheelock, Geo. W. Jones, John E. Adams, Marion Alford, Fred S. Alford, Buddle H. Atkinson, Harry B. Atkinson, Geo. M. Atkinson, Thomas J. Able, Clement V. Aylesworth, William L. Aaron, M. M. Aldrich, Jeremiah G. Adams, Henry L. Anderson, Eliza D. Anderson, Matthew Abrams, Joseph M. Allen, Edward H. Buckley,

Ernst Brockmeier, Frank Beebe, Charles H. Bull, William B. Bull, George Baker, G. W. L. Baker, Samuel Brown, John Burkholder, Richard H. Baker, Charles Baker, E. T. Bridge, William H. Bridge, Olive B. Brakefield, R. T. Bratten, Julia A. Burchett, W. D. Bratten, S. G. Blivin, Harvey O. Bancroft, John W. Boyd,
2257 David Boyd, John H. Brammel, Martha A. Blair, Harrison Brown, Joseph Brown, Henry Bush, John W. Brammel, Charles H. Brown, John C. Brown, Daniel C. Bates, Boyd Levee Drainage District, Frank H. Brinkman, Cornelius Brinkman, Antie S. Brinkman, George Brinkman, Edward F. Binns, Isaac Barton, William T. Barton, John Burns, Edward Bybee, Fannie Bybee, P. F. Barton, Daniel T. Ball, Milo M. Blake, James R. Berry, John F. Berry, Samuel Bunn, Norman Brown, William H. Beacom, Charles E. Brewster, Anna M. Brewster, Minerva M. Brewster, Carson W. Brewster, Enoch R. Chatten, E. A. Crandall, Martha A. Caldwell, William N. Caldwell, John L. Cupps, Frances L. Cupp, Samuel Clark, William A. Chandler, Sarah Chandler, William E. Churchill, Patrick H. Cashman, William C. Chandler Alex. T. Chandler, Landy S. Cory, Charles R. Churchill, Chester R. Churchill, Elmer Churchill, Maria Churchill, Ida Churchill, Almon J. Churchill, Anna M. Colton, Amanda Carter, John Clutch, Warren Clutch, Joseph C. Colvin, John W. Cannon, Daniel Caffrey, Sarah F. Colvin, Thos. Cochran, Mary Crews, Andrew Crews, Benjamin Camp, Orlando Camp, W. B. Curtis, Samuel Clemens, Sarah J. C. Clark, Mary E. Collins, A. G. Coley, Ason G. Chamberlin, John H. Duker, Theodore Duker, Thomas Davis, Mary A. Dean, James Demoins, Thomas Demoins, Joel L. Daud, Jesse Dutton, Silas Dutton, Albert Dutcher, Henry Dutcher, John N. Dewell, William Davis, Charles C. Dewell, A. M. Danely, Anna J. Dodge, Sarah A. Dutcher, Noble M. Dyke, Charles B. Dustin, Jeremiah Dempsey, Philip Donahoe, Joseph E. Dober, James M. Davis, Lucinda B. DeCamp, Wm. M. DeCamp, Jas. S. DeCamp, Geo. M. DeCamp, Adelia DeCamp, Adeline DeCamp, Esther DeCamp, Tata DeCamp, Helen Dodge, John T. Emison, Clinton Dodge, Joseph Elliott, Wilson B. Elliott, James Emerson, John Emerson, Lucy A. Ellis, O. J. Edmonds, August Fiel, O. J. Ferguson, William S. Fleck, George Furgeson, Jesse Fiel, James Fisher,

Final Decree Dismissing Bill.

2258 Louisa Ferguson, Newton Fleischlein, George Finley, John L. Freeman, George R. Fisher, Philip Fusselman, Albert H. Fishell, Irene M. Fesler, Charles W. Fleak, Nelson French, Alexander F. Ferguson, Jacob Flegle, Wiley A. Farmer, Edward B. Ferguson, Catherine Gunsett, Geo. Gunsett, John T. Gunsett, Maria H. E. Gunsett, John Henry Gunsett, Joseph B. Gilpin, William H. Govert, Adam Gruel, Jr., William Groh, Charles B. Gose, Ernst Gilhaus, Dennis Green, Letitia Green, Mary M. Grammer, August Gilhaus, James R. Grove, Christopher D. Greene, Samuel B. Gaines, Emily A. Gordon, Lewis Green, DeWitt Greene, William Gelvin, William H. Gorton, Ann Gard, Frank Gordon, John D. Gorton, Charles M. Gilmer, William H. Gay, James Gay, James C. Gay, Joseph J. Gano, Augustus L. Galloway, Mary E. Griffin, Ida E. Grimes, Maria A. Grabill, Eliza E. Harrington, Lewis H. Hull, Michael W. Hughes, Sophis Hull, John O. Hampton, Mary Hoskins, Herman Heidbreder, Lewis D. Hirsheimer, Samuel E. Hewes, Ozias M. Hatch, Mary M. Hull, Everett S. Hull, Mary C. Hull, George Hack, Nancy Hinds, Daniel Hack, Frederick Hack, Sarah E. Hornback, Henry Hoyle, James Hornback, Barnabas Hines, R. T. Hicks, Harry Higbee, R. W. Hart, Tyra A. Hayden, Mary E. Hayden, William H. Hyde, Virginia Hyde, Julia B. Hill, John B. Hill, Samuel Heavener, George Harvey, Werner Heidloff, Julia M. Higbee, Sue W. Higbee, Mary Hosford, Hepsey J. Hosford, Hilbert Hosford, Mary Hosford, James M. Henry, Elizabeth Halstead, G. H. Henry, Mary L. Horton, Aaron F. Hemphill, Alexander Hemphill, John Henry, William Henry, Marcia A. Henry, M. A. Henry, George Henry, Isaac A. Hoskins, George Hoskins, Samuel H. Hogsett, Charles Hanson, Isabel Hogsett, Adam C. Hilton, Daniel D. Hicks, Henry Heidholt, James S. Irwin, Rosella Ives, Francis J. Jackson, George W. Jones, Frank H. Jones, Fred Jones, Eliza H. Jackson, Jesse F. Johns,

2259 Alice Jennings, Emma L. Jones, Andrew M. Journey, George M. James, Fred Kaiser, Robert King, Gabriel Kay, George H. Kenady, Emma Kennedy, Wm. H. Knodel, Dollie Kuchman, Nancy E. Kinder, George King, Edward Kendrick, Isabella Kendrick, Wiley P. Kennedy, Thomas Kendrick, Esther Kendrick, Samuel G. Kendrick, Mary J. Kendrick, Geo. Kile, Jr., G. W. Klitz, C. P.

Final Dism

Klitz, Claus A. Luken, Junius C. Lewis, Eleanor Lewton, Julia Lyon, Wm. H. Lewis, Geo. C. Locke, John S. Lockwood, B. C. Lindsey, James Likes, Caroline Long, Mary Lyon, Mary Landrum, Elizabeth Lyon, Wm. Livingston, James F. Laurimore, Andrew S. Lovell, Martha Ladow, Mary Ladow, Eliza J. Lewis, Wm. P. Lovett, Clark F. Lovett, John S. Lovett, Emeline Long, Phoebe J. Long, William J. Long, Henry A. Long, George P. Long, John Miller, Henry C. Miller, Folkalena M. Miller, William Miller, Adam Miller, Mary Miller, Andrew Miller, Jr., Frederick Miller, Amalia Miller, Brice McCrory, Bernhard Miller, Susanna McTucker, James McTucker, Jessie McTucker, Eliza McTucker, Mary McTucker, John B. McTucker, Eilert Miller, H. H. Metz, Greene Moore, Samuel L. Morgan, Asa C. Matthews, Sarah McNutt, George McNutt, August Mashage, Christopher H. Miller, M. B. Mayes, George McFarland, James McWilliams, Mary E. Massie, Melville D. Massie, Logan T. Morey, Joseph McFarland, Eliza Morey, Nelson Morey, William Morey, Martha Morey, Dillard P. Motley, William Monroe, Frederick Meyer, J. M. Murray, Francis Marion, Sarah A. Morrison, William H. Myers, Jemima Myers, Newton J. Miller, Elizabeth J. Miller, Charles McCaleb, Alanson Mosier, John McLean, William McLean, Harriet Manker, John Mellhizer, Charles E. Morton, Lydia Mellhizer, Charles McDaniel, Mary McKenzie, Mary Moore, James Musgrove, Amelia J. Manker, Aurelia Nance, Clay Nickason, Clara Nickerson, Walter Nickason, George W. Nowell, Lucinda Newman, Daniel Orr, Henry Orr, Patrick Ormand, Wm. H.
2260 Odiorne, Emily Odiorne, Mary Odiorne, Sarah Odiorne, David O'Brien, Andrew P. O'Connor, Thomas Orr, Nancy J. Owsley, Theodore C. Poling, Ernst Pruesner, Mary Preusner, Milo A. Pratt, Geo. Pratt, John Penn, Mark Penick, Edwin Pendleton, Edward Prince, Virginia M. Prince, Amanda M. Pennefeather, Elijah Petty, Frank C. Priester, Wm. P. Pryor, Easton C. Peckham, Rachel Peckham, Edward C. Patterson, George P. Priestly, Hannibal W. Pitzer, Emma Pitzer, Samuel Phremer, Rebecca Praul, Henry D. Praul, George F. Praul, Randolph L. Praul, Anna B. Praul, Emma D. Praul, Ida M. Praul, Samuel Rollins, Johannes Reich, James Robertson, Timothy Rogers, Frederick Reich, Melvina Ross, Daniel W. Robbins, Melvina Reed, Chas.

Decree missing Bill

W. Reed, John R. Reed, James D. Rupert, Mary Ramsey, J. M. Ruyle, A. D. Rachel, Jason B. Ransom, Thos. W. Rodhouse, Antina Roy, Wm. H. Raftery, C. H. Rankin, Susan F. Ramsey, Frederick Speckhart, John Speckhart, Geo. F. Speckhart, Wm. Speckhart, Adam Speckhart, Wm. Schultz, Wm. Schaffer, August Schaffer, Tylee Shepherd, John B. Shepherd, Charles W. Seymour, Edward Seymour, Abner Shinn, Joel K. Scarborough, Clarissa J. Scott, Samuel M. Spencer, Harlow M. Spencer, Joseph J. Stolte, Anton J. Stolte, M. Shepherd, William Strickhorst, Kert S. Spicer, Frank J. Stolte, Wm. H. Spencer, Sarah B. Selms, Henry J. Stolte, Seaman Sprague, James W. Sprigg, James W. Sperry, Peter R. Steadman, A. B. Steadman, Sny Island Levee Drainage District, Walter Scoggan, Henry J. Sturtevant, Henry Smith, John Snider, Lubbe H. Schmidt, Solomon Shewe, Wm. G. Smith, Alice M. Smith, Melvina Smith, Louis K. Smith, Alonzo Shewe, Pulaski Shipman, Philander Shipman, James M. Shipman, Michael Strubinger, E. M. Seeley, Catherine Schleiker, Lewis P. Stone, Eugene B. Smith, Charles R. Shaw, Elvira W. Shaw, Stephen G. Shaw, George W. Schwartz, Samuel Sapp, William D. Shinn, Albion Shinn, William H. Sapp, Henrietta
2261 Smith, Charles T. Smith, Herman H. Stockheker, Mary J. Scott, Theophilus Snyder, Frank L. Schriver, John E. Sidwell, William Snyder, Augustus Simpkins, Frank Strubinger, Eliza J. Scott, John S. Scott, Margaret A. Skinner, Renslaer Sweet, Roscoe A. Sweet, Marjory Sidwell, Lizzie Schultz, Mary L. Strubinger, William A. Strubinger, Henry J. Strubinger, Sarah Strubinger, Tillie M. Strubinger, John O. Strubinger, Edwin F. Strubinger, Cora C. Strubinger, Mary E. Strubinger, Bert F. Strubinger, Roy Strubinger, Mary A. Snyder, Irene Stebbins, Frank Stebbins, Mary E. Sapp, William F. Sapp, Mary A. Sapp, Emma A. Sapp, John E. Sapp, Jr., L. A. Sapp, Charles R. Sapp, Bertie E. Sapp, Chrisopher C. Sapp, Edward A. Sapp, Robert J. Stillwell, Alonzo C. Sapp, Mrs. Brison Stillwell, Thomas H. Shaw, J. S. Stark, Albert J. Schmidt, Samuel Thompson, Philo E. Thompson, Clara Terhune, Sophia B. Thomas, J. S. Thomas, Jr., C. J. A. Thomas, Albert J. Thomas, W. S. Thomas, C. C. Thomas, John T. Twiggs, William Tammin, John B. Timmons, Elisha Timmons, Irwin Timmons, William Tolbert, Robert T. M. Travers, George Tipler, Franklin

Titsworth, Samuel C. Thomas, Admr. of S. F. Thomas, dec'd; Samuel Taylor, George H. Tryon, Edward Tyron, M. H. B. Talbot, Adeline Turnbaugh, Mary H. Turner, James B. Thompson, Mary L. Thompson, Emeline H. Tolbert, Jacob Turnbaugh, William E. Turnbaugh, Joseph M. Thurman, James B. Thurman, J. Smith Thomas, Board of Trustees Town 3, Range 8; Board of Trustees of Township 4, Range 8; Board of Trustees of Township 5, Range 7; Board of Trustees of Township 5, Range 6; Board of Trustees of Township 6, Range 6; Board of Trustees of Township 7, Range 4; Board of Trustees of Township 7, Range 5; Lewis Vorge, Abner B. Vining, Ruth A. Voshall, Sarah Voshall, John T. Voshall, Mary J. Voshall, Margaret M. Voshall, Mary Venable, Arthur Venable, Albert Venable, Alice Venable, Caroline Will-
2262 iamsmeier, Anna S. Woods, Thos. Worthington, Jr., Frank Westhold, John G. Wheelock, John H. Wheelock, Geo. K. Wheelock, Stanley Wheelock, Dexter Wheelock, Julia G. Wheelock, Abner V. Wills, Fielding J. Wilson, Augustus Wilkinson, Henry Wackencamp, Wm. Wilson, Eliza Wilson, Alexander D. Wilson, Sarah R. Whittaker, Helen Wells, Scott Wike, Joseph T. Whitney, William R. Wills, Layfayette Woodruff, Charlotte Westlake, Silas Wallace, John Ward, Lyman Ward, William D. Williams, Mahala R. Waggoner, Perry Wells, Elizabeth J. Wells, William R. Walston, Zephaniah T. Webster, Irwin D. Webster, George W. Wells, Edward Wells, John A. Wilson, Frederick Wiedman, Henry H. Webster, John H. Webster, E. F. Webster, Jacob Windmiller, Fred M. Whipple, James Walsch, James A. Yingling, William Yokem, America A. Yokem, Mary E. Yokem, James C. Yokem, Solomon Yokem, Henry F. Yokem, Francis Zerenburg, Levi M. Davis, James L. Edwards, Mercena Long, Lemuel Long, J. W. Long, George W. Long, John McDonald, Stephen McDonald, Joseph E. Jennings, John W. Jennings, William S. Jennings, Charles A. Jennings, A. M. D. Jones, Culver Killebrew, Nicodemus Pontera, Thomas J. Schultz, T. W. Sudbrack, Thomas J. Selby, Sup't Schools of Calhoun Co., Ill.; Samuel H. Green, Laura M. Hemphill, Joseph C. Harrison, David Shoemaker, John F. Nolte, executor of John Red; The Chicago & Alton Railroad Company, The Hannibal & Naples Railroad Company, The Chicago, Burlington & Quincy Railroad Company,

Final Decree Dismissing Bill

The Quincy, Alton & St. Louis Railroad Company, The Wabash, St. Louis & Pacific Railway Company, Gerritt Rosenkranz, Lewis Dutton, William Wilford, Charles M. Alger, Albert L. Allen, Alden Allen, Sarah E. Allen, Thomas H. Branham, L. T. Brittingham, I. B. Brittingham, Daniel S. Bowen, Samuel D. Barnes, Charles N. Clark George D. Clayton, Daniel Coney, Chester Churchill, Adam Constable, Emily Cunningham, Nelson Cunningham, Frank P. Can-
2263 ternury, Henry S. Carroll, C. L. Carroll, Wm. A. Davis, Jacob H. Dickason, Harriet A. Dickason, Henry F. Davis, David Dubach, Fred L. Dubach, Alfred M. Delano, Sarah E. Delano, Hugh A. Emison, Henry Edwards, Samuel K. Floweree, William H. Fisher, Alice Fisher William C. Forman, John H. Franklin, S. Anna Gordon, John H. Garth, William Glascock, Edward A. Glenn, Melissa Gruell, William H. Hatch, Ellen Harrington, John A. Hampton, Daniel L. Hafner, Hannibal Planing Mill Company, John R. Helms, Hannibal Bridge Company, Crow, Hargadine & Co., J. T. K. Hayward, Etta J. Hardin, William C. Hardin, Harvel Jordan, Alexander C. James and Jesse H. Rector, administrators of the estate of John D. James, deceased; Henry P. Jaynes, Martin Kincer, Jr., Aaron R. Levering, Alfred W. Lamb, Isaac N. Linley, George W. Low, Catherine Y. Meredith, Sarah Morris, Lyman P. Munger, William A. Munger, Henry W. Morris, David M. Morris, John J. McCune, William Merriwether, John A. Mackey, Silas W. Mackey, James L. Mackey, James A. Nelson, Andrew J. Newlan, Fred Naxera, Albert W. Pettibone, Nina M. Packard, M. G. Patterson, John B. Price, William W. Pierce, Sarah E. Parsons, Noah S. Rouse, Joseph Rowe, Edward Sharpless, Peter O. Sharpless, Mary L. Smith, Andrew J. Settles, Fannie C. Stillwell, Richard H. Stillwell, Mary Stillwell, Harold Stillwell, Earl Stillwell, Lucian Scott, Margaret C. Schmidt, Emma L. Schmidt, Carl H. Schmidt, Asa Turner, Edward Turner, 2d; John L. Van Every, Demas K. Ward, Lucy P. Wiggin, W. M. White, William Walden, Wilson Walker, J. T. Zook, John A. Krueg, Wilson A. Kendall, William McIntosh, John O. Roberts, James W. Stark, Alfred H. Smith, Warren S. Tibbetts, Charles E. Tibbetts, William A. Trauernicht; Henry S. Carroll, William J. Mackey and Charles P. Clifford, Executors of will of Benjamin P.

Clifford, deceased; J. T. Davis and Lizzie Davis, Will-
2264 iam McIntire, George E. Abbott, F. M. Casal, Charles Pinger, The Connecticut Mutual Life Insurance Company, Charles S. Warner, William Shively, John Blaul, Eliza A. Bishop, Emma P. Stanton, A. E. Clark, Henry Merrill, Benjamin Strauss, Hobart S. Horton, Octavia L. Horton, Smith S. Thomas, The North Western Mutual Life Insurance Company, James Aicons, George I. Ames, Franklin Bartlett, Alvey D. Buckley, John J. Bell, John Cole, Henry Churchill, Thomas Clarkson, John E. Dean, Lewis P. Drexler, Enos Devon, Augustus Eggman, Fred E. Green, James P. Fisher, Clarkson Gridley, William C. Harrington, James House, Catharine S. Harvey, Augustus Hanschild, Frederick Hoffman, Fannie V. Hubbard, Fannie V. Hubbard, Jr., Thomas King, Samuel Kern, J. R. Kiser, Rodney Lambert, Harvey Miller, Bernita Miller, Minor J. Mattison, B. W. Moore, James T. Myers, George Miller, Daniel Morgan, David McWilliams, A. R. McCoun, John S. Mullen, Elmer Miller, Parmelia Nance, Frank Orea, Eugene B. Pierce, Newton J. Parker, George Robinson, Charles Robb, George J. Shaw, Cyrus Stewart, Charles Standhart, John W. Smith, H. T. Shaw, Sumner J. Smith, H. R. Smith, Susan L. Sibley, Florence A. Strong, Bertha Stobemack, John E. Sloan, Sue M. Wagy, Alfred Worland, Daniel Weeks, Abram C. Anderson, James W. Anderson, John W. Crader, Henry Cutter, Susan DeMare, Warren S. Foote, Dannel Farrow, Mary Gill, S. S. Miller, J. Miller, J. W. Snodgrass, George A. Kibbe, Angela Iming, Ella K. Turner.

Final De
Dismiss

OPINION OF COURT.

2265

Michael W. O'Brien, et al., Executors,
vs.
John G. Wheelock, et al.

United States District Court,
Southern District of Illinois,
January Term, 1897.

Opinion of Co
filed Nov. 9,

John M. and John Mayo Palmer and Henry M. Duffield, Solicitors for Complainants.

Green & Humphrey and Thomas Worthington, Orr & Crawford and Mathews, Wike & Highbee for Defendants.

Allen, Judge.

Opinion of Court Nov. 9, 1895

The long extended litigation in this cause followed the act of the General Assembly of the State of Illinois, approved April 24th, 1871, entitled "An Act to Provide for the Construction and Protection of Drains, Levees and Other Works." At that time a body of land of an average width of three to five miles, extending for more than fifty miles from the mouth of Fall Creek in Adams County to Hamburgh Bay along the east bank of the Mississippi River and between it and the bluffs or high water marks of the river, containing one hundred and ten thousand acres, was subject to periodical overflows of the Mississippi River. These bottom lands were sparsely populated, but the owners agitated the project of protecting and reclaiming them with a view of their becoming productive and of greatly increased value. A supplemental act of the legislature was approved April 9, 1872, providing for the registration of bonds and declaring that when a Court found that any work authorized by the act was a public benefit, "the same should be deemed a public work," and extending the powers of the Commissioners, etc. Acting under these acts of the legislature, certain parties filed at the August term, 1871, of the County Court of Pike County, a petition praying for the appointment of Commissioners in the premises, and at the September term, 1871, the County Court of Pike County appointed William Dustin, George W. Jones and John G. Wheelock such Commissioners, who accepted, qualified and organized. In November, 1871, the Commissioners filed a report to the County Court with a surveyor's estimates, including a map of the district and a profile of the work to be done. At the December term, 1871, this 2266 report was approved and a jury impaneled to examine the land, assess the damages and benefits and make an assessment roll, which it seems was done and the report of the same spread upon the record. The Court directed that the assessments be paid in ten annual installments, commencing in 1882, with interest from the first day of October, 1872. Copies of this order for Pike, Adams and Calhoun Counties were made to the Commissioners and were recorded in said Counties on or before December 18, 1872. The Commissioners proceeded to acquire title to the lands for the site of the levee and contracted for the construction of the same, issued bonds and disposed of the same to contractors for the levee work, and from these contractors Complainants' testator purchased more than two hundred thousand dollars of said bonds. Afterwards the Commissioners filed another petition to raise an additional sum of money and proceedings similar to the first were had therein, resulting in assessments amounting to One Hundred and Forty-eight Thousand Five Hundred Dol-

lars. Upon the second assessments the Commissioners issued under the authority of the County Court One Hundred and Forty-eight Thousand, Five Hundred Dollars of bonds and sold the same to the contractors engaged in the construction of the levee, and these bonds were also purchased by Complainants' testator. The Commissioners attempted to collect installments of interest under the provision of the act for the collection of assessments "in the same manner as State and County taxes." Certain of the land-owners resisted this effort on the part of the Commissioners and the Supreme Court of the State of Illinois refused to enforce collection by the tax-collector by means of extension on the tax books, holding that the sections of the Act of 1871, providing for such collections, were unconstitutional and void. After this decision the number of land-owners provided a fund for repairing and protecting the levee by conveying to such Commissioners by deed of trust about thirty thousand acres of land, and authorizing them to make assessments on the land in each year in such
2267 amounts as were deemed necessary to keep said levee in repair. Money was raised under these deeds of trust and from different sources and expended on the levee for its protection and reconstruction. On the fourth day of May, 1878, Francis Palms, the Complainants' testator, filed a bill on behalf of himself and others in this Court against the Commissioners. Said bill is the original bill to which the bill in this suit is the supplement. In it Complainant Palms prayed, among other things, for a decree for an accounting of the moneys which he claimed to have advanced to the Commissioners, and the interest thereon; that he have for such an amount a lien upon the levee and the works and the lands acquired by the Commissioners for the site thereof and upon the assessment and interest thereon upon the other lands described in exhibit "A," that the Commissioners be ordered to proceed to collect said assessments and interest under the order and direction of the Court; for the appointment of receivers to take charge of said levee and all books and papers of said Commissioners and to collect under the direction of said Court said assessments and interests and for other and further relief. The Commissioners answered the bill, setting up the action of the Supreme Court in holding the Act of 1871 unconstitutional, denying that they were then or ever had been in the actual possession of any part of said levee except for the purpose of constructing, maintaining and repairing the same, and claiming among other things that because of the registration of said bonds with the Auditor of Public Accounts of the State of Illinois the bond owners had thereby elected the mode prescribed by the supplemental act of

Opinion of Court Nov. 9, 1895

1872 for the collection of interest on said bonds, and that they, said Commissioners, were by said election relieved from the duty of looking after the same—that certain land-owners had at all times opposed the proceedings which subjected their lands to assessments for benefits on account of said levee and had refused to pay interest accruing on said assessments, and because of this other land owners, otherwise inclined to pay their assessments, saw the futility of doing so unless payment could be enforced
2268 against all alike—which resulted in a return by the Township Collector of all, or nearly all, of said land-owners as delinquents. On the 13th day of March, 1879, the case having been set down for hearing upon bill and answer, the Court passed an order or decree "that defendants (Commissioners) retain the right of way, levee and other works and keep and preserve and protect the same under the order and control of this Court for the benefit of Complainants and all other persons interested therein."

"That Complainant and all other persons who may have advanced money to the Defendants for the right of way for the construction of said levee and other works or who may be the holders of any of said bonds issued by the Defendants to raise money for the purposes aforesaid who may come into this suit and contribute their proper proportion for the expenses thereof, have liberty to go before the Master and produce their bonds and coupons and make proof of the account due them of their principle and interest." The cause was referred to John A. Jones, Master in Chancery, to take proofs under proper notice of the amounts due Complainants and other parties, and to make report to the Court with such proofs of the amounts found due by him to each and every party who appeared before him with the grounds of the several findings. The order or decree then proceeded as follows: "That after the making of said report and the approval thereof by the Court, the said complainant or other persons have liberty to exhibit and file their supplemental bill or bills against any or all of the present or former owners of the land alleged in said bill to be benefited by said levee; to compel contribution of the payment of the amounts found due as aforesaid and for such other and further relief as they may be advised they are entitled to. That Complainants are at liberty to use the names of the Defendants in such supplemental bill if they are advised it is necessary for them to do so, upon tendering sufficient indemnity." It is also alleged in the present bill that after the rendition of the
2269 foregoing decree, certain persons named therein went before the Master and made proof of their several holdings of bonds, and that on the 7th day of July, 1880, another order or

decree was rendered in the original cause which was in substance that the Master had filed his report, together with certain exceptions of the Defendants thereto; that such exceptions were overruled and the report confirmed, the Court decreeing as follows: "And the Court does further order, adjudge and decree that there is due to the several Complainants upon their respective coupons produced and proved before said Master, and for interest upon the amount of such coupons up to the 1st day of July, 1880, as reported by said Master the following sums, that is to say, making an aggregate sum so found due to the Complainants as aforesaid of $304,908.26. The above amounts are found to be due without prejudice."

It is fairly inferable from the entire bill that counsel for Complainant treat the steps taken in this Court before the present bill was filed, as an adjudication, at least as to certain of the assessments described in exhibit "A" and as to the lands of some of the Defendants. Certain orders or decrees made March 13, 1879, and July 7, 1880, are referred to as supporting this view. It will be observed that the original bill named as Defendants only the Commissioners Dustin, Jones and Wheelock, and the first order refers the cause to the Master to ascertain the sum due Complainants, and it was also ordered that Complainants or other persons have liberty to file supplemental bill or bills against the present or former owners of said lands "to compel them to contribute and ask for such further relief as Complainants are advised they are entitled to." In the second order, July 7, 1880, the Master to whom had been referred the question of amounts due Complainants having reported, the Court overruled certain exceptions of the Defendants to such Master's report without prejudice and 2270 permits Complainants in their own names or in the names of the Commissioners to proceed in this Court against the lands of the land-owners. Tested by the rules usually applied in ascertaining whether an order of Court is a final and binding adjudication of the rights of persons and of property, these would seem to be wanting in some essential qualities. One of the first requisites of a valid final adjudication is that it shall be definite and certain. Now, is it at all certain from these orders, it was supposed by Complainants or counsel, or contemplated by the Court that the orders were binding upon any one other than the Commissioners in their official capacity. Had it been thought that the former proceedings concluded the Defendants and subjected their titles to the assessment in controversy the present steps would probably not have been taken. Complainants by their supplemental

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bill have brought in by name over one thousand defendants as having some interest in the property sought to be affected by the decree prayed for, and yet the logic of their contention seems to be that these defendants, in Court for the first time, are precluded by what is claimed to be a final adjudication, from raising the very questions on which the alleged liability depends. Probably these orders or decrees were only intended to be provisional, enabling Complainant to ascertain the sum due and get authority to bring in parties interested with such interlocutory relief as he may have been entitled to, and this view is strengthened by the qualification "without prejudice" in the order confirming the Master's report. It is further claimed by counsel for Complainants that the Commissioners were trustees for the land-owners to the extent of binding the latter in litigation. No evidence in the nature of deed or other instrument declared such trust or gave such power. Ordinarily no one can be bound by the act or representation of any trustee or agent where the effect or validity of the act on which the right of representation depends is itself a matter of dis-
2271 pute. One of the first difficulties in the way of Complainants to obtaining the relief sought by their bill is that of Laches. The Webster case declaring the act of 1871 unconstitutional, was decided by the Supreme Court of Illinois, January term, 1876, and from that time forward until May 4, 1889, neither Francis Palms nor his representatives nor any of the Complainants attempted to take any step against the present defendant except those who were Commissioners originally. The original bill to which this is a supplement was filed against the said Commissioners May 4, 1878, and no other land-owners were made parties defendant. On July 7, 1880, the last order was entered in the original cause, and from that time forward for almost nine years, no one moved. In the meantime the land embraced in the original Sny district was bought and sold and passed by succession and mortgage. Should it be conceded that the former orders or decrees had the force of solemn judgment, that force would have ceased long before the filing of the supplemental bill, for no effort or attempt was made to enforce these orders or decrees until the expiration of their lives as statutory liens. In Illinois neither a judgment at law nor a decree in Chancery has any force against the parties after the lapse of seven years from its rendition. Section 6, Chap. 76, Starr and Curtiss, Page 1386. And a Court of Chancery generally follows the law in applying the statute of limitations, and where there are exceptions a sufficient equitable excuse should be alleged in the bill and proved to account for and justify the delay. Walker v. Ray, 111 Illinois, 319-20. But equity

goes further than the law and refuses relief on the ground of laches in many cases where there would be no bar to an action at law, usually founded upon some change in the conditions or relations of the parties or the subject matter of the suit. Galligher v. Cadwell, 145 U. S. P., 372-3. Francis Palms had leave 2272 July 7, 1880, to file an amended or supplemental bill. He lived till November 24, 1886, and according to the testimony attended to his business until the day before his death. Neither he nor his executors took any steps whatever against the old Commissioners until the present bill was filed May 4, 1889. No excuse is alleged in the bill or shown by the testimony for this delay. In the meantime the condition of the property and the relations of the parties have greatly changed. But few of the parties connected with the original enterprise were living or owned land in the district when the supplemental bill was filed and their holdings represent but a small fraction of the whole. It appears from the proof that relying upon the decisions of the Updyke and Webster cases, and usually in ignorance of the case of Palms v. Wheelock et al., they expended large sums of money in rebuilding the levee or in constructing a new one in part, and in making improvements and repairs on their land. An amount of money in excess of the amount expended by the original organization has been paid out as an absolute necessity for repairs and protection. It is, however, now insisted in a general way by Complainants that Palms, the purchaser in open market of the bonds, was subrogated to the equity of the contractors. This position does not seem to be sound when tested by authority. It was held in Suppiger v. Carrels, 20 Bradwell, Appellate 111, 625, that "subrogation in equity is confined to the relation of the principal and surety and guarantors where a person to protect his own junior lien is compelled to remove one which is superior, and the cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt a mere volunteer." And Justice Miller in Aetna Life Insurance Co. v. Middleport, 124 U. S., 534, after quoting approvingly the syllabus in Suppiger v. Garrels, supra, says: "No case to the contrary has been shown by the researches of plaintiff in error, nor have 2273 we been able to find anything contravening these principles in our investigation of the subject. They are conclusive against the claim of the Complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market, without anybody's endorsement and as a matter of business. The Complainant company has therefore no right to the subrogation which it sets up in the present action." If

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there was no subrogation it seems clear that Mr. Palms or his representative cannot set up any use made of the loan even after he obtained his bonds as creating any estoppel whatever, and this view renders unnecessary any discussion as to whether any landowner was bound by estoppel. The equities of Mr. Palms must be determined from the condition of things existing when he obtained the bonds, as those alone would influence his action and upon those alone he could reply. Another question pressed upon the attention of the Court is important, because jurisdictional. Suppose defendants did consent to the act of 1871 and did thereby render the law valid in all particulars except the provision empowering and requiring ministerial officers to collect the assessments, and let it be admitted for the purposes of the argument that the defendants were bound to bear the burdens imposed by the law, without regard to the receipt or non-receipt of the benefits thereof, still the quesion arises, what has a court of equity of the United States to do with the matter? On what ground is the jurisdiction of the court sought to be maintained? There is no need to invoke the aid of equity if the act of 1871 is binding upon the defendants in all its parts. That act and the registration law provide all necessary machinery through the agency of the public officers. If the law failed as to any of its provisions for the assessment or collection of taxes, then will equity for that reason take jurisdiction? In a word, will the absence of any and all other effective remedies render it incumbent on the Court to act or
2274 invest it with power to do so? It is not to be denied that a federal court will sometimes compel the collection of a tax. When a Court of the United States renders a judgment and there is an officer invested with power to collect taxes wherewith to discharge such judgment, and it is the lawful duty of such officers to make such collections, the United States Courts will compel the discharge of such duties by writ of mandamus. But in the absence of such officer or officers so empowered by State authority, the United States Courts will not perform the duties of tax-collectors. Wakely v. The City of Muscatine, 6 Wallace, 481. Rees v. City of Watertown, 19 Wallace, 107. Hume v. Levee Commissioners, 1st Woods, 246, approved in State tax cases, 92 U. S., 575. Barclay v. Levee Commissioners, 93 U. S., 265. Thompson v. Allen, 115 U. S., 550. In the foregoing authorities upon this question of jurisdiction it seems to be substantially settled that when the machinery for the collection of taxes is in existence under State authority the federal courts will in a limited class of instances, compel the agents of the State to set the machinery in motion, but these Courts will neither themselves create the machinery,

nor invest any person with official power to use the same. Complainants are not entitled to the relief prayed for or to any relief in this Court under the pleadings and proofs in this cause. Opinion filed Nov

[Indorsed.]

Filed November 9, 1895.
James T. Jones, Clerk.

Then afterwards, to-wit: on the fifth day of April in the year of our Lord one thousand eight hundred and ninety-seven came again the complainants and filed in the clerk's office of said Court their petition for appeal, assignment of errors and bond on appeal which are as follows, to-wit:

2275

United States of America.

United States Circuit Court of Appeals for the Seventh Circuit.

Michael W. O'Brien and others, Complainants and Appellants, vs. John G. Wheelock and others, Defendants and Appellees.	Sny Levee District Bond Case.

To the Circuit Court of the United States for the Southern District of Illinois, in Equity.

Your petitioners, Michael W. O'Brien, Francis F. Palms and Clotilda Palms Book (born Palms), executors of and trustees under the last will and testament of Francis Palms, deceased, and Albert Blair, respectfully show: Petition f A filed Apr.

1st. That they are complainants in the above entitled cause.

2nd. That on the 5th day of February, 1897, the final decree was rendered in the above entitled cause in favor of the defendants and against the complainants.

3rd. That your petitioners, feeling aggrieved by said decree, and desire to appeal from said decree to the United States Circuit Court of Appeals for the seventh Judicial Circuit and file herewith their claim for such appeal.

4th. As your petitioners herewith file their bond on appeal in the penal sum of $3,000, with two sureties and also file herewith an assignment of errors as required by the rules of the said Circuit

tition for Appeal Court of Appeals, therefore your petitioners pray that said bond
dApr. 5, 1897 may be approved and said appeal allowed.

John M. and John Mayo Palmer,
Solicitors for Complainants.

Henry M. Duffield,
Of Counsel.

[Indorsed.]
Filed April 5, 1897,
James T. Jones, Clerk.

2276 United States of America.

United States Circuit Court of Appeals for the Seventh Circuit.

Michael W. O'Brien et al.,
Complainants and Appellants,
vs.
John G. Wheelock and others,
Defendants and Appellees.
} Sny Levee District Bond Case.

Assignments of Error.

Assignment of Errors dApr. 5, 1897 And now comes the said complainants and appellants by John M. and John Mayo Palmer, their solicitors and say, that in the record and proceedings in the said cause in the Circuit Court of the United States for the Southern District of Illinois in Equity and in the decree dismissing the bill of complaint in said cause, there was manifest error in this, to-wit:

(1) Because the said Court erred in deciding that complainants are not entitled to relief in this cause and in dismissing their bill of complaint.

(2) Because the said Circuit Court of the United States for the Southern District of Illinois held and decided that the act of the legislature of the State of Illinois, approved April 24, 1871, was not a valid enactment of the legislature within the constitutional power of the General Assembly of said State.

(3) Because the said Circuit Court of the United States for the Southern District of Illinois held and decided that the act of

the General Assembly of the State of Illinois approved April 24, 1871, did not confer upon the County Court of Pike County in the State of Illinois ample and complete jurisdiction over the subject matter of the petition filed in said County Court in the August term thereof in 1871. Assignm filed Apr.

(4) Because the said Circuit Court of the United States for the Southern District of Illinois held and decided that the said assessment roll and the order of the County Court of Pike County in the State of Illinois confirming the same was not a valid and conclusive judgment of a court of competent jurisdiction 2277 and was subject to collateral impeachment or attack.

(5) Because the said Circuit Court of the United States for the Southern District of Illinois held and decided that the assessment made under the act of April 24, 1871, were not a lien upon the lands assessed until paid as provided in the twenty-seventh and twenty-eighth sections of the Act of April 24, 1871.

(6) Because the Circuit Court of the United States for the Southern District of Illinois held and decided that the Complainants as purchasers of the bonds issued under the provisions of the thirty-fifth section of the Act of the General Assembly of the State of Illinois approved April 24, 1871, did not acquire an equitable right to enforce the lien provided by the twenty-seventh, twenty-eighth and thirty-fifth sections of said Act and that a court of equity has not ample jurisdiction to enforce the rights of complainants acquired under such sections.

(7) Because the said Circuit Court of the United States for the Southern District of Illinois held and decided that those defendants to said supplemental bill named in said bill and proofs who caused and procured the passage by the General Assembly of the State of Illinois the act of April 24, 1871, and who thereafter availed themselves of the provisions of said Act for the protection of their lands by the construction of a levee from Fall Creek in Adams County in said State along the banks of the Mississippi through Pike County to Hamburg Bay in Calhoun County could deny in a court of equity the constitutionality of said Act and the validity of the assessments made thereunder.

(8) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor and to the amount of their bonds a lien through the assessments decreed by the County

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Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who participated in the issue and sale of bonds to complainant Blair and the other complainants' testator by actively soliciting and procuring the passage of the Act by the legislature of the State of Illinois providing for the construction of levees approved April 24, 1871, but the said court dismissed the bill as to them.

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(9) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who are purchasers with notice of lands covered by said assessment from persons who participated in the issue and sale of bonds to complainant Blair and the other complainants testator by actively soliciting and procuring the passage of the Act of the legislature of the State of Illinois providing for the construction of levees approved April 24, 1871, but the said court dismissed the bill as to them.

(10) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who participated in the issue and sale of bonds to complainant Blair and the other complainants testator by signing and presenting the original petition for the construction of said levee to the County Court of Pike County, Illinois, in August, 1871, and the said Court dismissed the bill as to them.

(11) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who were purchasers with notice of lands covered by said assessments from persons who participated in the issue and sale of bonds to complainant Blair and the other complainants testator by signing and presenting the original petition for the construction of said levee to the Pike County Court in Illinois in August, 1871, and the said court dismissed the bill as to them.

(12) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who participated in the issue and sale of bonds to complainant Blair and the other complainants testator by filing on the 30th day of November, 1874, in the Pike County Court of Illinois the petition for the second assessment of 1875 to defray the cost 2279 of said levee as described in the bill and the said Court dismissed the bill as to them.

(13) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who were purchasers with notice of lands covered by said second assessment from persons who participated in the issue and sale of bonds to complainant Blair and the other complainants testator by filing on the 30th day of November, in the Pike County Court of Illinois the petition for the second assessment of 1875 to defray the cost of said levee as described in the bill and the said Court dismissed the bill as to them.

(14) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who procured the commissioners of said drainage district, defendants in this suit, to take exclusive possession and control of the said levee as their agents and use and appropriate the same to the protection of their land with the powers and under the provisions of certain trust deeds described in the bill of complaint and the said Court dismissed the bill as to them.

(15) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who are purchasers with notice of lands covered by said assessment from persons who procured the commissioners of said Drain-

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age District defendants in this suit to take exclusive possession and control of the said levee as their agents and use and appropriate the same to the protection of their lands with the powers and under the provisions of certain trust deeds described in the bill of complaint and the said Court dismissed the bill as to them.

(16) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who participated in procuring the submission by the legislature of Illinois and the adoption by the people of said state of the constitutional amendment of 1878 and the passage of the act of May, 1879, under the provisions thereof and the said Court dis-
2280 missed the bill as to them.

(17) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who are purchasers with notice of lands covered by said assessments from persons who participated in procuring the submission by the Legislature of Illinois and the adoption by the people of said state of the constitutional amendment of 1878 and the passage of the act of May, 1879, under the provisions thereof and the said Court dismissed the bill as to them.

(18) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who filed the petition in the Pike County Court of Illinois under said act of May, 1879, for the creation of the Sny Island Levee Drainage District and became parties to the proceedings therein and the said Court dismissed the bill as to them.

(19) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill be-

longing to certain of the defendants named in the bill and proofs who are purchasers with notice of lands covered by said assessments from persons who filed the petition in the Pike County Court of Illinois under said act of May, 1879, for the creation of the Sny Island Levee Drainage District and became parties to the proceedings therein and the said Court dismissed the bill as to them.

(20) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who were severally made parties to and had due notice of and were bound by all of the proceedings for the organization of the said Sny Island Levee Drainage District and the said Court dismissed the bill as to them.

(21) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who were purchasers with notice of lands covered by assessments from persons who were severally made parties to and had due notice of and were bound by all of the proceedings for the organization of the said Sny Island Levee Drainage District and the said court dismissed the bill as to them.

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(22) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who are heirs at law of ancestors or devisees of persons who took part in some or all of the proceedings before mentioned by which said bonds were issued and assessments levied and the levee constructed and the said Court dismissed the bill as to them.

(23) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs

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who are purchasers with notice of lands covered by said assessments from persons who are heirs at law or ancestors or devisees of persons who took part in some or all of the proceedings before mentioned by which said bonds were issued and assessments levied and the levee constructed and the said Court dismissed the bill as to them.

(24) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor and to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who have acquired title to the lands described in the bill in which they are now interested through deeds of conveyance expressly recognizing the lien of the assessments upon said tracts of land for the amounts advanced by complainants' testator for the construction of said levee and other works, and the Court dismissed the bill as to them.

(25) Because the said complainants were entitled to the relief prayed in the bill declaring in their favor to the amount of their bonds a lien through the assessments decreed by the County Court of Pike County against the lands described in the bill belonging to certain of the defendants named in the bill and proofs who have by the payment by themselves or their grantors of assessments made upon their lands by the said Sny Island Levee Drainage District having at the time of such payments full knowledge that the levee and other works were constructed with the
2282 funds furnished by complainants' testator and of the decrees of the Circuit Court of the United States for the Southern District of Illinois rendered in March, 1879, and July, 1880, declaring a lien in favor of the complainants' testator and also having full knowledge that no part of the amounts due to the complainants had been paid, approved, adopted and ratified the acts of said Sny Island Levee Drainage District in appropriating the said levee for the protection of their said lands and the Court dismissed the bill as to them.

(26) Because the court erred in holding and deciding that the complainant Blair and the other defendants' testator were guilty of laches in the prosecution of their claims under said bonds.

(27) Because the court erred in holding and deciding that the relief prayed in the bill was to collect a tax.

(28) Because the Court erred in holding that the complainants were not by the purchase of the bonds and the proceedings by them had thereunder subrogated to the equities of the contractors to whom the bonds were delivered by the drainage commissioners in payment of work done for and accepted by the latter. Assignm filed Apr

Lastly: Because under the allegations and proofs on behalf of the complainants in said cause they were entitled to a decree declaring a lien in their favor upon the lands of the defendants described in the bill of complaint to the amount of their bonds and interest thereon but the said Circuit Court denied their right and dismissed their bill.

And the said complainants and appellants pray that the decree aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for nothing and that they may be restored in all things which they have lost thereby.

John M. and John Mayo Palmer,
Solicitors for Complainants and Appellants.

[Indorsed.]
Filed April 5, 1897.
James T. Jones, Clerk.

Know All Men by These Presents: That Michael W. Appeal B filed Apr
2283 O'Brien, executor of and trustee under the will of Francis Palms, deceased, of the City of Detroit, as principal, and Frank W. Tracy of Springfield, Illinois, and Howard K. Weber of Springfield, Illinois, as sureties, are held and firmly bound unto John G. Wheelock and nine hundred and more other defendants named in and who have appeared to and answered the bill of complaint heretofore filed in the Circuit Court of the United States for the Southern District of Illinois in Equity by Michael W. O'Brien, Francis F. Palms and Clothilda Palms Book (born Palms) executors of and trustees under the last will and testament of Francis Palms, deceased, and Albert Blair (the several names of said obligees being omitted from this bond to save prolixity, but reference being made hereby to the said Bill of Complaint and appearances and answers and the names of the defendants therein to identify the obligees in this bond so that this instrument shall run and operate in their favor the same in all respects as though they were individually named herein as obligees) in the full penal sum of three thousand dollars ($3,000) lawful money of the United States to be paid to the obligees hereof or their certain attorneys,

Appeal Bond. Apr. 5, 1897

agents or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators and each and every of them jointly and severally firmly by these presents. Witness our hands and seals this fifth day of April, 1897.

Whereas the above described obligees did obtain and cause 2284 to be entered in the Circuit Court of the United States for the Southern District of Illinois in Equity in a cause therein pending wherein Michael W. O'Brien, Francis F. Palms and Clothilda Palms Book (born Palms), executors and trustees as aforesaid, and Albert Blair, were complainants, and the said John G. Wheelock and others were defendants, a decree in favor of said obligees and against said complainants and the said Michael W. O'Brien, Francis F. Palms anud Clothilda Palms Book (born Palms), executors and trustees as aforesaid, and Albert Blair, have appealed from the said decree to the United States Circuit Court of Appeals for the seventh Judicial Circuit.

Now therefore the condition of the foregoing obligation is such that if the said Michael W. O'Brien, Francis F. Palms and Clothilda Palms Book (born Palms), executors and trustees as aforesaid shall prosecute their appeal to effect and if they shall fail to make their appeal good, shall answer all damages and costs then this obligation to be void, otherwise to remain in full force and virtue.

Signed. M. W. O'Brien, Trustee. Estate of Francis Palms, deceased. [L. S.] Frank W. Tracy. [L. S.] Howard K. Weber. [L. S.]

Approved April 5th, 1897.
William J. Allen,
U. S. District Judge.

OK. as to sureties.
Green & Humphrey,
Sols. for Certain Defts.

[Indorsed.]
Filed April 5, 1897.
James T. Jones, Clerk.

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Then afterwards, to-wit, on the 28th day of April, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to-wit:

Michael W. O'Brien, et al.,
vs.
John G. Wheelock, et al.
} April 28, 1897.

Order to transmit to U. S. Circuit Court of Appeals certain original Papers

It appearing to the presiding judge proper that the following original papers should be inspected in the United States Circuit Court of Appeals for the Seventh Circuit upon the appeal taken in this cause, now therefore it is ordered that the clerk do transmit the same accompanying, but separate from and not bound with or attached to the transcript of record in this case, together with a certificate that they are original papers filed in this cause and transmitted in pursuance of this order, a copy whereof shall

2286 accompany said papers.

And it is further ordered that upon the final determination of said appeal in the said Circuit Court of Appeals, the clerk thereof shall, upon the request of the clerk of this court, return the said original papers to this court. The papers included in this order are described as follows:

Complainants' Exhibits.

Blue Pamphlet.
Large Book, Exhibit A.
Files in original suit of Palmer vs. Wheelock,
Including
Petitions of intervening parties.
Subscription marked exhibit "A," beginning with name of S. M. Spencer.
Printed pamphlet of additional assessment.
Original petition to Pike County Court.
Book Ex. 10, being copy assessment roll of said Sny Island Levee Dge Dist of 1880.
Copies of trust deeds.
Book Exhibit "X."
Articles of association or certificate of organization. See testimony Vol. 1, page 270, Exhibit 14.
Abstracts of title of lands referred to in Vol. 1 of testimony, pages 370 and 371.

Let to transmit to U. S. Circuit Court of Appeals with original papers.

Profiles marked Parkhurst exhibit "A" and Parkhurst Ex. "A."

Defendants' Exhibits.

Pamphlet blue Exhibit "A."
Pamphlet yellow Exhibit "B."
Opinion in Webster case.
Withdrawal of Mathers' Signature.
Profiles of Levee by Chamberlain.

Then afterwards, to-wit, on the said 28th day of April in the
2287 term and year last aforesaid, the following certificate of evidence was filed in said cause as follows, to-wit:

Michael W. O'Brien et al.,
vs.
John G. Wheelock et al.

Certificate of Evidence, dApr. 28, 1897

The said cause came on for hearing before and was heard by me upon the following evidence:

(a) The testimony reported by the Special Master Cheney and the exhibits accompanying the same and filed in the cause.

(b) The depositions of Michael W. O'Brien and Francis Palms, Henry W. Parkhurst and E. L. Corthell filed in said cause.

(c) And the testimony of C. N. Clark and H. S. Green and C. N. Clark and J. W. Jones stenographically taken on behalf of defendants in open court on the hearing, and afterwards transcribed and filed in said cause.

William J. Allen,
U. S. District Judge.

[Indorsed.]
Filed April 28th, 1897.
James T. Jones, Clerk.

2288 United States of America, } ss.
Southern District of Illinois.

Certificate of Clerk

I, James T. Jones, Clerk of the Circuit Court of the United States in and for the Southern District of Illinois, do hereby certify that the foregoing is a true copy of the pleadings and proofs in a certain cause wherein Michael W. O'Brien, Francis F. Palms and Clothilde Palms, executors of the last will and testament of Francis Palms, deceased, and Albert Blair are complainants, and John G. Wheelock, George W. Jones, John E. Adams and others are de-

fendants, as truly as the same appear of file and record in my office. Certificate

In Witness Whereof I have hereunto set my hand and seal of said Court at Springfield in said District this nineteenth day of June in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the one hundred and twenty-first year.

[SEAL] James T. Jones,
Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Michael O'Brien, et al., Executors of the last will of Francis Palms, Dec'd, et al., vs. John C. Wheelock, et al. } Cause No. 431.

It is hereby stipulated between counsel that the Clerk in printing the record on appeal in this case may omit the following described papers, orders, certificates, etc., substituting however for them the descriptions of them given in the index made by the Clerk of the Southern District of Illinois and transmitted with the record on appeal, namely: Stipulation

1st. All the papers, orders, files, etc., the originals of which are described in and set up in accordance with the order of the Court below, dated April 28, 1897, except the following papers and documents which are to be printed.

1. Blue pamphlet marked in pencil "pamphlet A shown Mr. Jones."

2. Original bill filed May 4, 1878.

3. Answer to said bill.

4. Orders in said cause of March 13th, 1879, and July 7, 1880.

5. Original petition filed in Pike County, August 21, 1871.

(Memo. For convenience the Clerk may print this from the copy in the pamphlet marked "Proceedings of the Pike County Court, 1871.")

6. Pamphlet (yellow) Exhibit B, except (a) copies of laws of 1871 and 1872. (b) Report of Corthell and (c) certificates of auditor.

ulation.

(Memo. Clerk will please enter these in the printed record and state that they are already printed in the blue pamphlet A.)

7. Opinion in the Webster case.

8. Withdrawal of Matthews' signature.

9. Copy of Trust Deed recorded in Volume 24 of Mortgages, at page 359.

10. A copy of only one of each series of the bonds involved in this suit, and included in the report of John A. Jones, special master, shall be printed, and it is stipulated that the other bonds of each series are in the same form as those printed.

2nd. The copies of the following papers, orders and profiles, etc., embraced in the transcript and which are not to be printed:

	Page of transcript.
Demurrer of Henry B. Atkinson	67
" of Harry Higbee and Sue W. Higbee	70
" of William Yokem	76
" of Robert F. Hicks and Thomas Worthington	79
" of Melville D. Massey and Samuel L. Spencer	82
" of James S. Irwin and J. K. Scarborough	85
" of J. H. Dickason, Scott Wike and W. A. Munger,	88
Order authorizing Commissioners to contract with L. C. & W. Ry. Co	92
Order extending time of defendants represented by Hay, Green & Humphrey to answer	93
Order extending time of defendants represented by Orr & Crawford to answer	93
Order on non-residents to appear, plead and answer or demur	170
Replication to answer of John G. Wheelock and 367 other defendants	171
Replication to answer of Charles E. Morton and 112 other defendants	172

Decree pro confesso against defendants served by subpœna. 173

Decree pro confesso against defendants served by publication..... 184

Decree as to M. A. Henry and 5 other defendants served by subpœna..... 181

Replication to answer of Albert L. Allen and 111 other defendants..... 190

Order setting aside default as to Nina Packard..... 192

Appeal Bond.....2283

Order allowing appeal and approving bond 2285

Order extending time to July 1st, 1897, to file record in Court of Appeals 2287

It being understood, however, that counsel for any of the parties may on the hearing refer to any paper, plat or profile which is part of the transcript on appeal or sent up in accordance with the above order of Judge Allen of April 28, 1897, but which is not printed in pursuance of this stipulation.

Dated January 20th, 1898.

HENRY M. DUFFIELD,
Counsel for Appellants.

H. S. GREEN and
J. O. HUMPHRY,
HARRY HIGBEE,
THOS. WORTHINGTON,

Counsel for Appellees named in their answer.

A. G. CRAWFORD,
JEFFERSON ORR,

Counsel for Appellees named in answer filed by them.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1897.

No. 431.

MICHAEL W. O'BRIEN, et al., Executors of the Last Will of FRANCIS PALMS, et al.,

vs.

JOHN G. WHEELOCK, et al.

It is hereby stipulated and agreed by and between Henry M. Duffield, solicitor for the complainants in the above entitled cause, and Greene & Humphrey, Thomas Worthington, Harry Higbee and A. C. Matthews, solicitors for the defendants represented of record by them, and A. G. Crawford, solicitor for defendants represented of record by him, that the following order entered in the Circuit Court of the United States for the Southern District of Illinois in said cause may be filed with the clerk of said Circuit Court of Appeals, and that the same shall be made a part of the transcript of said cause in said Circuit Court of Appeals.

The order of said Circuit Court above referred to is in the words and figures following, to-wit:

"Now on this first day of November, A. D. 1895, come the complainants by their solicitors and counsel, Henry M. Duffield, and also come the defendants represented by Greene & Humphrey, Thomas Worthington, Harry Higbee and A. C. Matthews, also the defendants represented by A. C. Crawford, their solicitors and counsel.

And the complainants, by leave of Court, make an amendment to the supplemental bill of complaint, by inserting after the word 'deceased' in the third line of said printed bill the following words: 'all of whom are residents and citizens of the State of Michigan.'

And said complainants also, by leave of Court, amend the supplemental bill of complaint by dismissing said bill as to defendant Eliza A. Bishop, and said amendments being consented to by all the parties represented as aforesaid, are

hereby considered and ordered as fully made to the same extent as if originally written in said supplemental bill."

Dated this seventh day of June, A. D. 1898.

H. S. GREENE,
H. M. DUFFIELD,
Sol. for Appellants,
By ASHLEY POND.
THOS. WORTHINGTON.
HARRY HIGBEE,
A. C. MATTHEWS,
Solicitors for defendants represented of record by them.
A. G. CRAWFORD,
By T. WORTHINGTON,
Solicitor for defendants represented of record by him.

(See duplicate annexed by signature of Benjamin Harrison.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1897.

No. 431.

MICHAEL W. O'BRIEN, et al., Executors of the Last Will of FRANCIS PALMS, et al.,

vs.

JOHN G. WHEELOCK, et al.

It is hereby stipulated and agreed by and between Henry M. Duffield, solicitor for the complainants in the above entitled cause, and Greene & Humphrey, Thomas Worthington, Harry Higbee and A. C. Matthews, solicitors for the defendants represented of record by them, and A. G. Crawford, solicitor for defendants represented of record by him, that the following order entered in the Circuit Court of the United States for the Southern District of Illinois in said cause may be filed with the clerk of said Circuit Court of

Appeals, and that the same shall be made a part of the transcript of said cause in said Circuit Court of Appeals.

The order of said Circuit Court above referred to is in the words and figures following, to-wit:

"Now on this first day of November, A. D. 1895, come the complainants by their solicitors and counsel, Henry M. Duffield, and also come the defendants represented by Greene & Humphrey, Thomas Worthington, Harry Higbee and A. C. Matthews, also the defendants represented by A. C. Crawford, their solicitors and counsel.

And the complainants, by leave of Court, made an amendment to the supplemental bill of complaint, by inserting after the word 'deceased' in the [illegible]d line of said printed bill the following words: 'all of whom are residents and citizens of the State of Michigan.'

And said complainants also, by leave of Court, amend the supplemental bill of complaint by dismissing said bill as to defendant Eliza A. Bishop, and said amendments being consented to by all the parties represented as aforesaid, are hereby considered and ordered as fully made to the same extent as if originally written in said supplemental bill."

Dated this seventh day of June, A. D. 1898.

BENJ. HARRISON,
Of Counsel.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF ILLINOIS.

MICHAEL W. O'BRIEN, FRANCIS E. PALMS, CLOTHILDE PALMS et al., Executors of FRANCIS PALMS, Deceased

vs.

JOHN G. WHEELOCK, et al.

In Chancery.

Now on this first day of November, A. D. 1895, come the complainants by their solicitors and counsel, Henry M.

Duffield, and also come the defendants represented by Greene & Humphrey, Thomas Worthington, Harry Higbee and A. C. Matthews, also the defendants represented by A. G. Crawford, their solicitors and counsel.

And the complainants, by leave of Court, make an amendment to the supplemental bill of complaint, by inserting after the word "deceased" in the third line of said printed bill the following words: "all of whom are residents and citizens of the State of Michigan."

And said complainants also, by leave of Court, amend the supplemental bill of complaint by dismissing said bill as to defendant Eliza A. Bishop, and said amendments being consented to by all the parties represented as aforesaid, are hereby considered and ordered as fully made to the same extent as if originally written in said supplemental bill.

Circuit Court of the United States, Southern District of Illinois. } ss.

I, James T. Jones, clerk of the Circuit Court of the United States, in and for the Southern District of Illinois, do hereby certify that the foregoing is a true copy of an order of Court entered November 1st, 1895, in a certain cause wherein Michael W. O'Brien et al., Executors of Francis Palms deceased, are complainants, and John G. Wheelock, et al., are defendants, as truly as the same appears of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at Springfield, in [Seal.] said District, this 5th day of July, in the year of our Lord one thousand eight hundred and niety-eight.

JAMES T. JONES, Clerk.

The following proceedings were had in the appeal to the United States Circuit Court of Appeals for the Seventh Circuit:

July 13, 1897.	The appearance of Henry M. Duffield as counsel for the appel
July 13, 1897.	Appearance of Thomas counsel for some of tered.
July 24, 1897.	The appearance of H. S of the appellees ente
Jan'y. 20, 1898.	Stipulation and order in respect to the record in the United States Circuit Court of Appeals.
May 2, 1898.	Cause set down for hearing on June 9th, 1898.
May 21, 1898.	Certified copy of order of the Circuit Court of the United States for the Southern District of Illinois reviving the cause in the name of the executors of Francis Palms, filed under stipulation.
May 27, 1898.	Cause set down for hearing June 9th.
May 28, 1898.	Appearance of Harry Highbee for certain appellees entered.
May 28, 1898.	Appearance of A. C. Matthews for certain appellees entered.
May 28, 1898.	Appearance of A. G. Crawford for certain appellees entered.
June 1, 1898.	Cause set down for hearing June 7th.
June 4, 1898.	Amendments to bill of complaint (printed in record of Court of Appeals).
June 6, 1898.	Assignment of Mr. Justice Harlan to hold the United States Circuit Court of Appeals for the Seventh Circuit.
June 7, 1898.	Hearing of cause in part.
June 8, 1898.	Hearing of cause concluded.

June 8, 1898. Ten days' leave given counsel on both sides for filing additional brief.

July 26, 1898. Stipulation of counsel and order of the United States Circuit Court for the Southern District of Illinois filed, printed on pages 505 to 508 of the record of Court of Appeals.

June 6, 1899. Order of the U. S. Circuit Court of Appeals dismissing the bill of complainants.

June 6, 1899. Opinion of United States Circuit Court of Appeals.

OPINION OF THE U. S. CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

(95 Fed. Rep., p. 883.)

UNITED STATES CIRCUIT COURT OF APPEALS

SEVENTH CIRCUIT.

No. 431.—MAY SESSION, A. D. 1898.

MICHAEL W. O'BRIEN, et al., Executors of Francis Palms, Appellants, vs. JOHN G. WHEELOCK, et al., Appellees.	Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Before HARLAN, *Circuit Justice*,* and WOODS, *Circuit Judge*.

Mr. Justice HARLAN delivered the opinion of the Court.

This case relates to certain proceedings under an act of the General Assembly of Illinois approved April 24th,

*Mr. Justice Harlan sat in this court under special assignment made in conformity with 3617 of Revised Statutes.

1871, entitled "An act to provide for the construction and protection of drains, ditches, levees and other works."

The principal question is whether the lands of the appellees, who were the defendants below, and who numbered about one thousand, are liable for assessments that were made under that act to pay certain bonds issued many years ago to contractors, which were purchased by Francis Palms and are now held by his executors.

It is contended that the act was in violation of the Constitution of Illinois as it then was and as interpreted by the Supreme Court of that State, and that the bonds in question were void because issued in violation of law.

It is insisted on the other hand that the decisions of the State court do not go to the full extent asserted by the defendants, and that if they did the question of the constitutionality of the act of 1871 and the validity of the bonds issued under it is one upon which this court is bound to exercise its independent judgment.

It is also insisted by the appellants, who were the plaintiffs below, that even if the bonds were issued without the sanction of a valid enactment, the lands of the defendants are, under the circumstances disclosed by the record, liable for the amount of the assessments made against them for the payment of the bonds held by the plaintiffs.

The plaintiffs in support of their claim rely upon certain orders made in the court below in a suit instituted by Palms in his lifetime against the commissioners appointed under the act of 1871, and under whose direction the bonds were issued. The defendants insist that their rights were not affected by the orders made in that suit. The defendants further insist that the long time that elapsed after the last of those orders were made before the institution of the present suit shows such laches upon the part of the plaintiffs as precludes a court of equity from giving them relief, independently of any other question in the case.

This litigation is of such a character, and the questions pressed upon the attention of the court are so numerous, that a somewhat extended statement of the facts disclosed by the record is necessary in order to bring out clearly the grounds upon which in our judgment the determination of the cause must rest. When that is made, little need be said in order to dispose of the case.

By the above act of the General Assembly of Illinois it was provided that whenever one or more owners or occu-

pants of lands desired to construct "a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter." § 1.

The act required notice by publication to be given of any petition filed under its provisions; and that "such notice shall state when and in what court the petition is filed, the starting point, route and terminus of the proposed drain or drains, ditch or ditches, or levees, and if a levee or other work is intended to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition." § 2.

If the drain or drains, ditch or ditches, levee or other work proposed to be constructed, was to pass through or over or be constructed upon lands lying in different counties, the petition could be filed in the county court of either county. § 4.

The court in which the petition was filed was empowered to determine all matters pertaining to the subject-matter of the petition.

If it appeared that the proposed drain or drains, ditch or ditches, levee or other work was necessary, or would be useful for the drainage of the lands for agricultural and sanitary purposes, the court was required to so find, and appoint three competent persons as commissioners to lay out and construct such proposed work § 5.

It was made the duty of the commissioners to examine the lands proposed to be drained, and those over or upon which the work was proposed to be constructed, and determine—"(1) Whether the starting point, route and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all respects proper or most feasible, and if not, what is or are so; (2) The probable

cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor; (3) What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work; (4) What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding." § 9.

If the commissioners found and reported that the expense would more than equal the benefits, the proceedings were to be dismissed; if less, then they were to have plans, profiles, surveys and specifications made, and report the same to the court. §§ 10, 11.

The commissioners were not confined to the point of commencement, route or terminus of the drains or ditches, or to the number, extent or size of the same, or the location, plan or extent of any levee or other work as indicated in the petition. But they were directed to locate, design, lay out and plan the same as they thought would drain the petitioner's land with the least drainage and for the greatest benefit of all the lands to be affected thereby. All plans proposed by the commissioners could be changed by the court on the application by them or by any person interested. § 12.

The act required due notice by publication to be given of any application to confirm the report, and the privilege was given to all persons interested to appear and contest its confirmation, or to ask any modification thereof. If no objections were made to the report, or if the objections made to it were not well taken, it was to be confirmed. If the court was of opinion that the report should be modified, it was given authority to make such modification as would be equitable. §§ 13, 14.

If the report was confirmed, then the court was authorized to impanel a jury of twelve men competent to serve as jurors, who being duly sworn were required to assess damages and benefits according to law; or the court could direct that a jury be impaneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners could apply to any justice of the peace in the county, who should immediately, without the formality of any written application, proceed to summons

and impanel a jury of six men competent to serve as jurors, who should be sworn in the same manner as was provided in case of a jury impaneled by the court in which the proceeding is pending, the justice to enter upon his docket a minute of such proceeding before him and the names of the jurors. § 16.

The duty of the jury was to examine the land to be affected by the proposed work; ascertain to the best of their ability and judgment the damages and benefits sustained by or accruing to the land affected by the construction of the proposed work; make out an assessment roll, in which should be set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as was most convenient, the number of acres in each tract, and if damages were allowed, the amount of the same; and in case damages were allowed to and benefits assessed against the same tract of land, the balance, if any, should be carried forward to a separate column for damages or benefits as the case might be. § 17.

In making the assessment the jury were required to award and assess damages and benefits in favor of and against each tract of land separately, in the proportion in which such tract of land would be damaged or benefited; and in no case should any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it would be benefited by the proposed work, according to the best judgment of the jury. § 18.

The commissioners, or any person who made objection to the assessment, were given the right of appeal from the finding of the jury. If upon such appeal there were corrections of the assessment, or if the assessment roll was confirmed, then the roll was to be spread upon the record, with right of appeal or writ of error therefrom. §§ 24, 26.

At the time of confirming the assessment, the court could order the assessment of benefits to be paid in instalments of such amounts and at such times as would be convenient for the accomplishment of the proposed work, otherwise the whole amount should be payable immediately upon the confirmation, and should be "a lien upon the lands assessed until paid." § 27.

It was made the duty of the clerk, immediately after the entry of the order of confirmation, to make out and certify to the commissioners a copy of the assessment roll, and also to make out and deliver to the commissioners separate copies of the same, pertaining to the lands situated in different counties, to be recorded in the recorder's office of the respective counties in which the lands were situated, and which should be notice of the lien thereon to all persons. § 28.

Upon receiving a certified copy of such assessment, the commissioners could proceed to collect the same or any installment thereof, or certify the assessment of any instalment thereof which they might be entitled to collect at the time to the county clerk of the county in which the lands assessed were situated, who was required to "extend the same, in a separate column, upon the proper tax books for the collection of State and county taxes : Provided, the owner, agent or occupant of any land through or on which any drain, ditch or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the vaue thereof upon his assessment." § 29.

In case the assessment for benefits should be payable in instalments, such instalments were to draw interest at the rate of ten per centum per annum from the time they became payable till they were paid, and the interest could be collected and enforced as part of the assessment. § 29.

Other sections of the act are as follows:

"§ 13. When the commissioners shall have elected to collect any assessment or instalment thereof themselves, or shall not have caused the same to be extended upon the State and county tax books, and any assessment or instalment shall be due and be uncollected, and as often as any instalment shall become due and be uncollected at the time for making return of the tax books for the collection of State and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any instalment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of State and county taxes in the counties or

respective counties where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amount so collected to the commissioners."

"§ 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee or other work for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and side drains, and may employ all necessary agents and servants, and enter into all necessary contracts, and sue and be sued."

"§ 35. The commissioners may borrow money, not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment on account of which the money is borrowed shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

"§ 37. All damages over and above the benefits to any tract of land shall be payable out of all the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same."

"§ 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy or in any manner impair the usefulness of any drain, ditch or other work constructed under this chapter, or that may have been heretofore constructed, for the purposes of drainage or protection against

overflow, may be fined in any sum not exceeding two hundred dollars, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the state of Illinois, and all fines when collected shall be paid over to the proper commissioners, to be used for the work so injured."

"§ 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying or impairing the usefulness of any such drain, ditch, levee or other work, shall be liable to the commissioners having charge thereof for all damages occasioned to such work, and to the owners and occupants of lands for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction." *Laws of Ill.* 1871-2, pp. 356-365.

Proceeding under the above act, numerous owners and occupants of the lands known at the time as the Mississippi bottom lands, in the counties of Adams, Pike and Calhoun, Illinois, filed a petition in the County Court of Pike County, expressing their desire to construct drains and ditches and also a levee and other works across the lands of others in that bottom, for agricultural and sanitary purposes, so as to reclaim the bottom land from overflow by the waters of that river, "in order to make the location salubrious and render the soil available for tillage and otherwise develop the agricultural resources of said bottom land." They represented that "said bottom land has been from time immemorial, and now is, a low and nearly level tract of land formed by deposits of alluvion from said river; that it is traversed throughout nearly its entire length by a slough or bayou known as the Sny Cartee slough; that said bottom land is also variously intersected by other and smaller sloughs, some of which are short channels putting out from the river and returning thereto, while others start from and return to the said Sny Cartee slough, and others are again lateral branches connecting said Sny Cartee slough with the river; that the said bottom

land is below the level of the high water mark of said river, and absolutely without protection therefrom; that the greater part thereof is nearly every year inundated by the waters of said river, and all are subject to inundation, and have been repeatedly submerged by said overflow, the river on such occasion being a stream from about four to eight miles wide and running from bluff to bluff on either side;" that by reason of said exposure to overflow, the mass of the said bottom land has been allowed to remain in its primitive condition, and will so remain unless reclaimed; that it is but sparsely populated, and that the occupants thereof support themselves almost exclusively by the cultivation of the soil; that they are every year greatly embarrassed in putting in their crops by the peculiar character of the rise in said river, which has no regular time for reaching its maximum height, nor any fixed number of rises during a season; that their crops when planted are frequently destroyed by an unexpected rise in said river, and in such cases they are either compelled to replant their crops, or the crops are destroyed so late in the year as to render the operations of the season a total failure;" "that upon the subsiding of the waters the said bottom land is left in a wet and marshy condition, so that the stagnant water is left on various parts of its surface, and the succeeding heat of summer and autumn evolve therefrom malaria and disease;" "that by reason of said facts said bottom land not only remains sparsely populated, while the territory around it is thickly settled, but the same is practically incapable of supporting any further population, so that the average taxable value of the lands now subject to overflow is no more than about fifty cents per acre, and the present occupants of said bottom lands have been in most cases induced to remain solely by the prospect of the ultimate reclamation of said land, a consummation which has been the theme of their enterprise and endeavor ever since the settlement of the bottom land described."

The petitioners called the attention of the court to the act of 1871, and asked the appointment of commissioners, in accordance with the provisions of that law, "for the purpose of constructing a levee on the Mississippi River, from a point on said river at or near the head of the Sny Cartee, in the county of Adams and State of Illinois, and thence in a southerly direction along or near the east bank of the Mississippi River, as shall be deemed advisable for the

safety of the proposed work, to a point at or near the mouth of Hamburg bay, in the county of Calhoun, State of Illinois, and to do and perform any and all acts, as provided in said law, for the surveying, laying out and constructing, altering, repairing, enlarging, protecting and maintaining said proposed levee, or to render it efficient for the protection and reclamation of the lands lying east of the said levee and between it and the bluffs, and now subject to overflow by the Mississippi River and other streams."

After asking a confirmation of the report of the commissioners, if they found and reported that the proposed levee could be constructed at a cost not exceeding $5 per acre for all lands benefited and reclaimed from overflow, the petitioners prayed "that the assessment for benefits upon the property to be affected by the construction of said work shall be paid in ten equal annual instalments, the first instalment being due and payable three years after the date of the commissioners' report and the filings of the plans and specifications with the court, and one-tenth of such assessment, with accrued and accruing interest, each year thereafter until the whole amount shall have been paid."

The County Court of Pike County having found that the proposed work was necessary, appointed in 1871 William Dustin, George W. Jones and John G. Wheelock Commissioners, and they duly qualified and acted in that capacity. In the same year the Commissioners reported the result of their examination, and in their report indicated by map and profiles the work to be done. The report was confirmed without objection, and a jury of twelve was organized to assess damages and benefits and make an assessment roll. The assessments were made and put upon the record of the court. Certified copies of the assessments were recorded in Pike, Adams and Calhoun Counties. An order was made requiring the assessments to be paid in ten annual instalments, with interest from October, 1872.

In conformity with the order of the court, the Commissioners issued bonds from time to time, upon estimates made by the engineer as the work progressed, to be used in the construction and completion of the work. They were delivered directly to the contractors as they were earned. The first issue of bonds amounted to $499,500, of which Francis Palms purchased $202,500. A second issue was

made amounting to $148,500, which were also purchased by him. That issue was the result of a second petition under the act of 1871, proceedings under which resulted in further assessments.

It may be here stated that by an act of the General Assembly of Illinois, approved April 9th, 1872, it was provided that whenever it appeared by the findings of the court before which proceedings were pending or might be had, under the act of April 24th, 1871, that any drain, ditch, levee or other work authorized by that act to be made would be of public benefit for the promotion of the public health, or in reclaiming or draining lands, the same should be deemed "a public work;" and that it should be lawful for the commissioners appointed under the act of 1871 to register at the office of the auditor of public accounts any bonds issued by them under order of court—such registration to show the date, amount, number, maturity and rate of interest of the bonds, and the fact of such registration to be certified by the auditor under his seal of office upon each bond. The act contained other provisions, but it is not necessary to refer to them.

All of the bonds issued by the Commissioners were in the same form. We give here a copy of one of them issued in 1872:

"No. 6. United States of America. $500.

Sny Island Levee Bond.

"State of (Ten per cent interest bond.) Illinois.

"The Commissioners appointed by the County Court of Pike County and State of Illinois, on the petition of John Morris and others to locate and construct a levee on the Mississippi River in the counties of Adams, Pike and Calhoun, by virtue of an act of the General Assembly of the State of Illinois, entitled 'An act to provide for the construction and protection of drains, ditches, levees and other works,' and by power vested in them by said act acknowledge themselves, as such Commissioners, held and firmly bound unto John G. Wheelock or bearer in the sum of Five Hundred Dollars, lawful money of the United States, payable in the city of New York at the Bank or Agency used by the Treasurer of the State of Illinois, on the first day of October, A. D. 1882, with interest at the rate of ten per cent per annum, interest payable on the first day of July in each year on the surrender of annexed coupons as severally due.

"This bond is one of a series of Five Hundred Thousand Dollars issued for the purpose aforesaid and after an order of the County Court of Pike County aforesaid approving of the assessment made by a jury of the cost of said levee.

"In witness whereof, the said Commissioners," etc.

Annual interest coupons payable to bearer were attached to each bond.

On each bond was endorsed a certificate in these words:

"Auditor's Office, Illinois.
Springfield, Nov. 12th, 1872.

"I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled, 'An act to provide for the registration of drainage and levee bonds, and secure the payment of the same,' approved April 9th, 1872, and in force July 1st, 1872.

"In testimony whereof," etc.

At the January term 1876 of the Supreme Court of Illinois the case of *Updike vs. Wright*, 81 *Ill.*, 49, was decided. That case involved, among other questions, the constitutionality of the above act of April 24th, 1871, providing for the construction and protection of drains, ditches, levees and other works. The case related to certain proceedings taken for the construction of a levee on the banks of the Wabash River. The representation to the county court was that the lands of the petitioners were subject to overflow from that river; that their fences and crops were liable to be swept away and destroyed by such overflow; and that the same could be prevented by an earthwork levee.

After observing that the above act of 1871 was evidently passed in view of Article 4, Section 31, of the Illinois Constitution of 1870, declaring that "the General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others," Chief Justice Scott, delivering the unanimous judgment of the court, said: "Apparently, an effort was made to have the law enacted conform to the constitutional provisions in every particular. Hence, it is declared the work to be done is the construction of drains and ditches for agricultural and sanitary purposes, and if it becomes necessary, in the con-

struction of a system of drainage, that a 'levee or other work' be adopted to make that system available, such levee or other work may be constructed under the provisions of the statute. But it is nowhere intimated the owners or occupants of land may undertake, under the provisions of this law, the building and maintenance of an immense levee on the borders of a river, not connected with any system of drainage by ditches. Neither the Constitution nor the statute contemplates any such work. What was in the minds of the framers of the Constitution, and the legislators who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of a 'levee or other work,' is always in connection with a system of drainage in that mode. The work outlined by the Constitution and the statute is comparatively insignificant, and may be done at no great cost; but that which is undertaken in this case is the construction of a levee on the banks of the Wabash River, of many miles in length, and estimated to cost a great many thousand dollars. No system of drainage by drains and ditches was planned, nor deemed necessary for agricultural and sanitary purposes. The representation to the county court is, the lands of the petitioners are subject to overflow from the Wabash River; that their fences and crops are liable to be swept away and destroyed by such overflow; and that the same can be prevented by an earthwork levee. The undertaking is one of great magnitude, and will require the expenditure of large sums of money. The assessment on complainant's land is over $10,000. And the allegation in the bill is, that unless all further assessments proposed to be made be arrested, the levee will cost more than the land is worth. Any construction of the statute that would warrant the owners or occupants of lands to enter upon such an immense and costly work, seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes that 'levees or other works' may be undertaken, as auxiliary to the drainage of the lands. Our opinion is, this is the only construction the statute will bear, consistently with the Constitution; otherwise one owner, whose lands are subject to overflow at certain seasons of the year, from a river, could set in motion the proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of

others in the vicinity which commissioners appointed by the court might deem benefited by the improvement. Such a work cannot be said to be draining lands by drains and ditches over the lands of others; nor is such a levee in any just sense, in the language of the statute, 'necessary to the drainage of the lands.' *The work of constructing a great levee along the banks of a river subject to overflow*, which defendants are about to do, *is not embraced within the provisions of the statute, and is, therefore, without authority of enabling law.*"

But the court proceeded to observe that the decision could be placed on the ground that the General Assembly possessed no power under the Constitution to vest commissioners or juries selected, or the county court, with authority to assess and collect taxes or special assessments for the contemplated improvement. It said: "Section 5, Article 9, of the Constitution of 1848, which declared 'the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body 'imposing the same,' was always construed by the decisions of this court, as a limitation upon the power of the General Assembly to grant the right to assess and collect taxes to any other than the corporate or local authorities of the municipalities or districts to be taxed. *Board of Directors vs. Houston*, 71 *Ill.* 318; *Harrard vs. The St. Clair and Monroe Levee and Drainage Co.*, 51 *Ill.*, 130; *South Park Commissioners vs. Salomon*, 51 *Ill.* 37; *Gage vs. Graham*, 57 *Ill.* 144; *Hessler vs. Drainage Commissioners*, 53 *Ill.* 105. It was also held, that power in the legislature was subject to the further limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the taxpayers to be affected. That section of the Constitution of 1870, upon this subject, provides: 'The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.' The

clause in the present Constitution, like that in the Constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the General Assembly can only vest cities, towns and villages with power to make local improvements by special assessments, or special taxation upon contiguous property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns and villages are within the constitutional provisions, and although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same. With equal propriety, this clause of the present Constitution must be regarded as restricting the General Assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the legislature possesses plenary power, unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments or taxes for every conceivable purpose. As we have seen, only cities, towns and villages may levy special assessments or special taxation for local improvements, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition such taxes shall be uniform in respect to persons and property. It would seem therefore to follow, as a corollary from the propositions stated, that neither the commissioners or the juries selected, nor the county court, is such a body as, under the Constitution, may be given power to make local improvements by special assessments or by special taxation upon contiguous property. There is still another consideration that has an important bearing upon the decision of the case. The clause of the Constitution we have been considering, like that in the Constitution of 1848, must be understood, in the light of the decisions of this court, as forbidding the General Assembly from imposing a burden, by taxation, upon any locality, without the consent of the citizens affected. Under this law, the people whose property is subject to taxation or assessments have never given any consent to it, if we exclude those who may have signed

the petition addressed to the county court. No opportunity was afforded them to do so, nor does the law make any provision for submitting the question to a vote, to ascertain the will of those whose property is subjected to this local burden. It is imposed upon them under the statute, by the decision of the county court. Obviously, that section of the Constitution that declares 'the General Assembly may pass laws permitting the owners or occupants of lands to construct drains or ditches, for agricultural and sanitary purposes,' implies that the community whose property is to be taxed may have the right of election in the matter. Otherwise an onerous burden may be imposed upon them, without their consent; and such proceedings might be had as would result in the deprivation of property. How can the land owners be permitted to construct drains and ditches unless some election is guaranteed to them? The language employed implies voluntary action. Illustration will make the inconsistency of the present law apparent. For example, the privilege is given to any occupant, as well as the owner of land, of presenting a petition to the county court. Should the construction contended for prevail, a tenant residing upon land adjacent to a river, subject to overflow, might present a petition, and, under the decision of the court, the work of erecting a levee, miles in length and costing large sums of money, might be entered upon, and the expenses assessed upon the property in proximity to the river that might, in any degree, be deemed benefited. An intention to confer such unwarranted power upon one man, who would himself be subject to none of the burdens imposed, ought not to be imputed to the legislature. Any laws not permitting an election as to the propriety of undertaking the work, are vicious, and within the inhibition of the Constitution. It does not militate against this construction that the land owner may appear before the county court when the petition is presented, and resist the application, or may contest the assessment upon his property when made. Whether the contemplated work shall be undertaken, and his property subjected to taxation, is not made to depend upon his election, but upon the decision of the court. It would be a solecism to call that privilege an election."

At the same term of the court the case of *Webster vs. The People* (unreported) was decided. That case related to the above work undertaken under the authority of the

County Court of Pike County. The efforts of the Commissioners to collect instalments of interest on the assessments were resisted by certain land owners. The Supreme Court of Illinois said: "The principal questions raised and discussed in this case are the same as in *Updike et al. vs. Wright*, decided at the present term, and for an expression of our views reference is made to the opinion in that case. For the reasons there given the judgment in this case will be reversed and the cause remanded."

It may be well to state in this connection that the Supreme Court of the United States, in *Harter vs. Kernochan*, 103 *U. S.*, 562, 570; referring to section 5, Article 9 of the Illinois Constitution, declaring that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, has said: "It is the settled law of the State, as heretofore recognized by this constitutional provision was intended to define the class of court, that this constitutional provision was intended to define the class of persosn to whom the right of taxation might be granted, and the purposes for which it might be exercised; and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns and villages, or for any other than corporate purposes. See also *County of Livingston vs. Darlington*, 101 *U. S.*, 411." *Weightman vs. Clark*, 103 *U. S.*, 256, 259.

After the above decision in *Webster vs. The People*, certain land owners undertook to provide for the protection of their lands from overflow by the execution of deeds of trust to the Commissioners. Under these deeds as much perhaps as $30,000 was raised and expended by the Commissioners.

In May, 1878, while those deeds were in force, Palms on behalf of himself and others instituted a suit in equity in the Circuit Court of the United States for the Southern District of Illinois against the Levee Commissioners. The bill in that case recited the above legislation and the proceedings resulting in the appointment of the Commissioners, the assessments by the jury, and the issuing of bonds by the Commissioners, and charged that the expense of the work was paid by the Commissioners with money furnished by Palms and others, of which, it was alleged, the owners

and occupants of the lands benefited and assessed were at the time well aware. Referring to the 29th section of the act of 1871, prescribing the duties of the Commissioners, and also to the above act of 1872, that bill alleged that the Commissioners made efforts "to collect the amount of some of the instalments of said assessments and the interest thereon, but the courts of the State of Illinois, before whom the question of the collection of such assessments and the instalments thereof under said statutes was brought, refused to give effect to the provisions of said acts, so far as they purported to authorize the collection of the same by the collectors of taxes under extensions on the tax books, and no means are left for the collection of such assessments and interest except such as may be supplied by the general authority of the courts that have jurisdiction of such questions. And your orator would further show unto your honors: That the whole amount of the moneys advanced by him, and by other purchasers of the bonds, with interest thereon, remains unpaid, and that said Commissioners remain and continue in the actual use and possession of the said levee and other works, constructed with the moneys borrowed of your orator and others, by the said Commissioners, under the proceedings aforesaid; and they do also, by and under the direction of the owners of said lands, keep and use the said works to protect their own lands, and the lands of the other owners and occupants, from overflow from said river. And your orator further shows unto your honors: That the said Commissioners refuse to pay to your orator and the other holders of said bonds, the whole or any portion of their principal—money loaned to them for the purposes aforesaid—or interest, and they also refuse to enforce the collection of said assessments on the several tracts of land described in said Exhibit A, or the interest thereon, as it is their duty to do, and the owners and occupants of said lands refuse to pay said assessments, or the interest thereon, so that the moneys loaned by your orator for the construction of said works is wholly lost, together with the interest thereon. And your orator would further show unto your honors: That the owners and occupants of said lands are very numerous, as will apear by the lists of land and the names of the owners thereof, as stated and set forth in the said Exhibt A, and the names of many of them are unknown to your orator, but all of them reside in other of the States

of the United States than the State of Michigan; the greater number of them are residents and citizens of the States of Illinois and Missouri; and that the said Commissioners, John G. Wheelock, George W. Jones and Benjamin F. Westlake are citizens of the State of Illinois, and of the Southern District aforesaid."

The relief asked was a decree directing an account to be taken of "the moneys loaned and advanced" by Palms to the Commissioners "to be used by them in the purchase and acquisition of the lands required for the location and construction of the said levee and other works, and for the construction and the completion of the said levee and all the works and improvements connected therewith, together with interest thereon, at the rate of ten per cent per annum, according to the terms of said bonds and the coupons thereto attached;" the amount due Palms being ascertained, then that such amount be adjudged a lien in favor of Palms "upon the said levee and other works, and the lands acquired, owned and held by the said Commissioners for the site of said levee and all other improvements, and upon the said assessments upon all of the said lands described in the said Exhibit A, for the benefits to said lands, afforded by the said levee and other works, and the interest thereon;" and that "the said Commissioners proceed at once, under the order and direction of your honors, to collect such assessments upon all and every of said tracts of land and the interest that has, or that may hereafter, accrue thereon, or so much thereof, from time to time, as will be sufficient to pay the interest money or the principal, payable to your orators as the same falls due; or that it may please your honors to appoint one or more competent persons as receiver or receivers, to take possession and charge of the said levee and other works and manage and control the same, together with all the books, papers and properties of said Commissioners, and with authority to collect, under the order and direction of this honorable court, the said assessments and interest thereon, as often and in such sums as may be sufficient to meet and satisfy the claims of your orators as aforesaid."

The Commissioners answered in that case, insisting, among other things, that the bonds in question having been registered with the Auditor of Public Accounts under the act of 1872, they were not responsible for the failure to collect the money to pay interest, and were without any

duty in respect to the said assessments. They referred to the fact that certain land owners had at all times opposed the proceedings instituted to assess their lands for benefits on account of the said levee, and refused to pay interest on assessments, in consequence whereof the township collector had returned nearly all the land owners involved in the proceedings as delinquents; that thereupon the county collector made application to the Pike County Court to enforce said assessments against the delinquent lands; that some of the land owners opposing the assessments filed objections to judgment for such assessments, setting up that the law under which the assessments were imposed was unconstitutional; that the Commissioners employed counsel to prosecute the application for judgment and for the collection of said assessments, and the County Court gave judgment against the lands; that the land owners appealed to the Circuit Court, which affirmed the judgment of the County Court; that thereupon the land owners carried the case by appeal to the Supreme Court of the State, stipulating that one appeal should be decisive of all the assessments; that the Commissioners themselves employed counsel in the argument of the case in the Supreme Court of the State, and said court decided adversely to the right to collect said assessments; and that such decision of the highest court of the State was decisive of any question of right on their part to enforce assessments. The case refered to by the commissioners in their answer was the above case of *Webster vs. People*. The Commissioners also averred that "as such Commissioners they are not now and never have been in any actual possession of any part of said levee or other work, except for the purpose of constructing, maintaining and repairing the same; that they have never had title to any portion of the said levee as they are likewise advised and believe on account of the unconstitutionality of the law under which said work was done; and that since said law was declared unconstitutional these respondents as Commissioners have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair."

On the 13th day of March, 1879, that cause was heard upon bill and answer in the Circuit Court of the United

States. By that court it was adjudged and decreed "that the said defendants [the Commissioners] take, retain and hold the right of way, levee and other works and property in question and described in the pleadings, and keep, take care of, preserve and protect the same, under the order and control of this court, for the benefit and on behalf of the complainant, and all other parties interested therein, or who may hereafter be found to be interested in the same in whole or in part."

It was further decreed "that the complainants and all other persons who may have loaned or advanced money to the defendants for the acquisition by those of the said right of way, or for the construction of the said levee and other works and property connected therewith, or who may be the holder of any of the bonds issued by said defendants to raise money for the purposes aforesaid, or to pay for such right of way or the construction of such levee and other works, or to pay any of the proper expenses connected therewith, who may come into this suit contributing their proper proportion to the expenses thereof, have liberty to go before the master and produce these said bonds and coupons for interest thereon, and make proof the amount due them of principal and interest on account of such loans, advances and bonds; and the cause is referred to John A. Jones, master in chancery, for the purposes aforesaid, who will upon the application of the complainants or other persons who may come into the cause as complainants, upon the terms hereinbefore prescribed and reasonable notice to the defendants or their solicitors, proceed to take the proofs of the amounts due to the complainants, and allow parties who may have before that time come into the cause, and after such proofs are taken, make a report to the court of the amounts found by him to be due each and any party who may appear before him, and the ground and facts of his several findings and conclusion;" and "that after the coming in of the master's report of the amount or amounts found by him to be due to the complainant or other persons who may come into the cause as aforesaid, and the approval of said report and the determination and adjustment by the court of the amount or amounts due to the complainant or other persons who may come into the cause for moneys advanced or loaned on bonds held as aforesaid, the said complainants or other persons have the liberty to exhibit and file their supple-

mental bill or bills against any or all the present or former owners of the said lands alleged in said bill to be benefited by the said levee and other works, or who have heretofore or who may now be in any way interested in the said levee and other works or the land benefited thereby, to compel them to contribute to the payment of the amount or amounts which may be found due to the said complainant or other persons as aforesaid, and for such other and further relief as they may be advised they are entitled to, and the court reserves all other questions of relief to the parties, and of the costs, to be considered hereafter. And the said complainant is at liberty to use the names of the defendants in any such proceeding by way of supplemental bill, if they are advised it is necessary to do so, upon rendering them a sufficient indemnity against all costs and expenses."

The master to whom the cause was referred to ascertain the amount of the several bonds and coupons made his report showing the names of various persons and the amount of bonds held by them respectively. The amount reported as due to Francis Palms on the bonds held by him was $221,228.26. The total amount found due to him and certain parties who became co-plaintiffs with him in the cause was $304,908.26. In the decree confirming the master's report it was declared: "And it is further ordered, adjudged and decreed by the court that the said several sums of money so found to be due to the said complainants as aforesaid, are a lien upon the assessments made under the order of the County Court of Pike County, in the State of Illinois, upon the lands described in the bound book Exhibit 'A' with complainant's bill, and upon the said lands as provided in the twenty-seventh and thirty-seventh sections of an act of the General Assembly of the State of Illinois entitled 'An act to provide for the construction and protection of drains, ditches, levees and other works,' approved April 24th, 1871. And it further appearing to the court that the defendants, Commissioners under the several orders of the County Court of Pike County, aforesaid, have no money in their hands for the payment of the amounts so found and adjudged to be due to the said several complainants, and it also appearing to the court from the allegations of the complainants' bill, and not denied by the said defendants in their answer thereto, that they have taken no steps for the collection of the assessments made

upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the court that the complainants have the right and liberty to proceed in this court in the name of the said defendants as complainants as such Commissioners, or in their own names as complainants against the lands described in the said Exhibit 'A' and the owners thereof, or such of such lands and the owners thereof or other persons, and said commissioners as they may be advised, are liable for or bound to pay the sums found to be due to the complainants as aforesaid jointly or severally by a bill or bills, original, supplemental or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit."

It should be here stated that after the decision in *Webster vs. People*, and after the institution by Palms of the suit in the Circuit Court of the United States, the following amendment to the Constitution of Illinois was adopted: "The General Assembly of Illinois may pass laws permitting the owners of land to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authority thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by a special assessment upon the property benefited thereby." *1 Starr & Curtis' Anno. Stat. Ill., p. 122.*

Subsequently the Legislature of Illinois passed an act which took effect May 29th, 1879, entitled "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." *1 Starr & Curtis' Anno. Stat. Ill., p. 919.*

Some of the defendants in the present case made efforts to secure the passage of the act last referred to. That act provided for the formation of drainage districts with authority not only to construct drains, ditches and levees for agricultural, sanitary and mining purposes, but also to maintain and keep in repair any such drains, ditches or levees "heretofore constructed under any law of this State;" and in cases where a levee had been theretofore

built "under any law of this State," the annual assessment for keeping the same in repair was made due and payable on the first of September annually.

Subsequently, on the 26th of January, 1880, some of the land owners whose lands were described and included in the orignal assessments and in the original bill filed by Palms, instituted proceedings under the act of 1879. In their petition they described the route and terminus of the levee, alleging that the levee "was constructed under the laws of Illinois then in force in the counties of Adams, Pike and Calhoun for the years 1872, 1873 and 1874." They further alleged that by proper repair and maintenance of the levee the lands aforesaid (which are alleged to be part of the lands described in the original bill and in the present bill, amounting in the aggregate to about 90,000 acres) would be reclaimed and brought into cultivation; that in addition it would greatly improve the sanitary condition of the locality through which the levee passed; and that it was absolutely necessary for the health and proper drainage and protection of the said land that the levee be repaired as speedily as possible. They prayed that a drainage district, to be known as Sny Island Levee Drainage District, be formed out of the lands subject to periodical overflow by the Mississippi River in the townships named, for the repair and maintenance of such levee, according to the statute; that Commissioners be appointed under the act of 1879, with directions to do all acts provided in the law for repairing levees, ditches and drains, through assessments to be ordered; and for other and further relief.

Such proceedings were had that the County Court of Pike County duly created the Sny Island Drainage District, and in 1880 it received the surrender of the levee from the original Sny Levee Commissioners, and now retains possession and control of the same.

Palms died on the 24th day of November, 1886, more than six years after the last order made in the suit brought by him in the Federal court.

The present suit was brought by his executors—the defendants herein being the surviving Commissioners, Wheelock and Jones, and numerous individuals who own lands within the territory described in the proceedings instituted in the County Court of Pike County under the act of 1871.

The bill proceeded upon the general ground that each

tract of land in question was chargeable in equity with the amounts assessed against it under the act of 1871, with interest, and that the plaintiffs had a lien on each tract for such sums as had fallen due and might become due under such assessments. It alleged that each defendant owned or claimed one or more tracts (Exhibit "A" showing a description of the various tracts and the names of the persons against whom the assessments were made); that each defendant who acquired title to any of the lands after the assessments of 1872 and 1873 did so with full knowledge of such assessments and the above issue of bonds, as well as of the fact that the plaintiffs had purchased the bonds and that the levee was constructed with the proceeds thereof; that with like notice and knowledge each of the defendants had appropriated and used the levee for the protection of their lands, and continued so to do; that all the defendants named in Exhibit "A" participated in causing said bonds to be issued and sold and the proceeds expended by actively soliciting the passage of the act of 1871; that before and at the passage of the act of 1871 the reclamation and protection of the lands described in that exhibit had been a subject of consideration and discussion amongst the owners and occupants of the same as well as others, and it was understood by all parties interested in such lands that in order to reclaim and protect the same a statute was absolutely necessary, under the provisions of which the persons interested in the lands could be united and organized and a common agency created with authority to make all necessary plans, estimates and contracts for the location of the levee and to borrow money upon bonds or otherwise, to be secured by assessments or pledges of the lands benefited; that the defendants, through the agency of their co-defendant Charles M. Clark, had procured the passage of that statute, and caused its provisions to be made known to the people interested, and thereupon devised a plan for the organization of a corporation composed of persons interested in the lands for the purpose of raising money to put the act into effect; that a large number of the defendants subscribed to the capital of that corporation in order to effect the objects of its creation; that other defendants purchased lands through such last-named land owners with full notice of the equities of the plaintiffs; that all of the defendants who purchased after May 4th, 1878, did so with full notice of said assess-

ments and that the same were unpaid, and also that said orignal suit in the Federal court was pending; that certain other defendants participated in causing the said bonds to be issued and sold to the plaintiffs' testator and the proceeds thereof to be expended in the construction of the levee, and in causing the said assessments to be made by assigning the original petition to the Pike County Court in the year 1872; that certain other defendants purchased lands from other landowners who had joined in the petition with full knowledge of what had previously taken place; that other defendants participated in procuring the bonds to be sold and the proceeds to be expended as stated and in causing said assessments, by signing on the 20th day of November, 1874, a petition for a second assessment under the act of 1871; and that other defendants purchased from or through persons of the class last mentioned with full knowledge of all the facts.

The plaintiffs also alleged that certain named defendants after the above decision by the Supreme Court of Illinois, knowing the levee to be constructed with the plaintiffs' money, and having full notice of all the facts, executed to Jones, Wheelock and Westlake deeds of trust; that said deeds were made for the purpose of defeating the claims of the plaintiffs, and it was stipulated between the trustees and the last named defendants that no part of the funds collected by the former should ever be applied to the payment of any indebtedness created by or on account of the original levee; that said deeds of trust continued in force until 1887, when the same were canceled, said Jones, Wheelock and Westlake having, it is alleged, devised another scheme for defeating the claim of the plaintiffs; and that certain other defendants purchased from defendants of the class last mentioned with full notice of all the facts.

It was further alleged that after the decree of March 13th, 1879, namely, on January 26th, 1880, certain defendants named filed a petition in the County Court of Pike County setting forth that they owned certain lands and alleging that a certain levee, the one heretofore described, had been constructed under the laws of the State of Illinois; that said petition set forth the purposes for which the levee had been constructed; that the same was in bad repair; that in the faith that the same would be properly constructed and repaired they had expended large sums of money, had improved farms, and that all such im-

provements would be washed away unless the levee should be repaired and kept up, and that the lands subject to overflow amounted to an aggregate of 90,000 acres. The bill set forth the substance of the petition and the various steps taken, as already stated, for the formation of a new drainage district to be known as the Sny Island Levee Drainage District, and alleged that all the defendants so joining had full notice of all the facts and of the making of the assessments aforesaid; that certain other defendants purchased lands from the defendants of the class last mentioned with notice of all the facts; that certain other named defendants, pursuant to the statute of Illinois approved May 29th, 1879, were severally made parties to and had notice of all the proceedings for the organization of the Sny Island Levee Drainage District as well as of the contents of the petition therefor, and were bound by such proceedings and the appropriation of the levee aforesaid; that certain other named defendants acquired title to said lands or interest therein after July 26th, 1880, and were bound by said proceedings and the appropriation of said levee; that certain other defendants named were heirs at law and took title to portions of said lands from ancestors who took part in some or all of the aforesaid proceedings; that certain other defendants had acquired title to some of said lands by accepting deeds of conveyance expressly recognizing the lien of plaintiffs on said tracts; and that every one of the present defendants had full notice of the claims of plaintiffs and of the facts aforesaid, and that all of the defendants now appropriated said levee and other works and refused to contribute anything to the payment of the plaintiffs.

The bill alleged that the Sny Island Levee Drainage District had every year made large assessments, and contriving and intending to defeat the plaintiffs had caused many of the tracts of land to be sold for non-payment of such assessments—such sales, it was alleged, being merely colorable as against the rights of the plaintiffs and mere clouds on the title to said land; that before the construction of said levee the lands were wet and not worth exceeding fifty cents per acre; that the average amount assessed against the lands for the cost of the levee was greatly in excess of the then value of the lands, but it was expected that the work would when constructed drain every tract and so enhance the value of the same as to make the lands ample

security for the money borrowed; that the plaintiffs relying on this and on the assurances of the landowners and Commissioners, purchased the bonds in question; and that the lands were enhanced in value by said expenditures until they became worth $25 per acre.

It was also alleged that if the levee had been kept up it would have afforded full protection and would have caused the lands to have continued to be good security; that defendants had spent some money in repairing said work, but made such improvements and repairs so unskilfully that they were insufficient, and that by neglect of the defendants the lands had again become wet and overflowed and were not now good security for the plaintiffs.

After stating that the defendants were, by reason of the matters and things set forth in the bill, bound to preserve, protect, improve and repair the said levee and other works described, by sufficient contribution in money, ratably or otherwise, and by further assessments upon the lands, in order to protect and keep the security of the plaintiffs adequate and sufficient, the plaintiffs prayed that by the appointment of a receiver with ample powers, and by other appropriate order, the defendants should be compelled to preserve, protect, repair, improve and make said levee and other works protective of said lands, "or to give and confer upon such receiver the power to make needful assessments upon said lands in proportion to benefits and the relative value of each tract thereof, and with the money arising therefrom, or by the mortgage of such assessments and the lands upon which they are made, raise the money necessary for the repair and improvement of the said levee and other works, and with the money so raised proceed to repair and improve said levee until it is made adequate for the drainage and protection of all of the said lands; that each and every of said defendants herein may be enjoined by this honorable court from selling, transferring or assigning the title to said lands owned by them, or any part thereof, upon which any of said assessments may rest, except subject to the lien of said assessments, as the same shall be determined by this honorable court, or in any manner whatsoever changing, altering or affecting the title thereto so as to in anywise impair, diminish, hinder or prejudice the lien of said assessments thereon, or on any portion thereof, and that the Sny Island Levee Drainage District, its officers and agents, be enjoined from selling or offering for

sale any lands covered by any of the assessments herein in question, for any pretended assessments or alleged liens by said District attempted to be assessed, except subject to the lien of all assessments and liability on said lands respectively, as the same shall be determined by this honorable court."

It was further asked in the bill that the court order, determine and declare the amounts due to the plaintiffs and all other holders of bonds and coupons who would come in and contribute to the expense of this suit, "and the amount due for principal and interest on the several assessments made against and upon each tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon each tract of land necessary to the payment of the amount of the principal and interest now due upon the bonds and coupons of your orators and others who may come into the cause and contribute as before mentioned, and that each of the said tracts of land be sold under the order and decree of this court for the amount chargeable upon and against the same, unless the owner of the same, or some other person for him shall, within a day limited, pay said amount, with a just proportion of the costs of this suit;" and also that the court would "appoint one or more commissioners or receivers in the place and stead of the said John G. Wheelock and George W. Jones, or appoint a commissioner in the place of the said Benjamin F. Westlake, deceased, and if one or more commisisoners or a receiver or receivers are appointed in the place and stead of the said John G. Wheelock and George W. Jones, the said Wheelock and Jones may be ordered and directed to turn over and deliver to such commissioners or receivers so appointed, all books, papers, documents and property now in their possession or under their control."

The defendants demurred to the bill, and the demurrers were overruled. They subsequently filed answers, which put the plaintiffs upon proof of many essential allegations of their bill, without proof of which, independently of the question of law arising upon the face of the bill, no part of the relief asked could have been granted. In the view which is taken of the case by this court, it is unnecessary to extend this opinion by setting forth the averments and denials of the several answers.

Upon final hearing the Circuit Court dismissed the bill.

Naturally, the first question to be considered is whether

the act of 1871, under which the bonds in question were issued, is to be treated as consistent with the Constitution of Illinois in force when that act was passed. We have seen what the highest court of the State said upon that subject in *Updike vs. Wright* and *Webster vs. The People*, above cited. The language used by that court is so clear and emphatic as to leave no room to doubt that it intended to adjudge that the act of 1871 was unconstitutional, and that any proceedings taken under it, whether by commissioners, juries or courts, were without the sanction of law. When the court adjudged that as a corollary from the propositions stated by it "neither the commissioners or the juries selected, nor the county court is such a body as, under the Constitution, may be given power to make local improvements by special assessments or by special taxation upon contiguous property," the question of the constitutionality of the act of 1871 was concluded so far as the Supreme Court of Illinois was concerned. The only doubt that can arise as to the scope of the decisions in *Updike vs. Wright* and *Webster vs. The People* comes from some general observations of the court in *Blake vs. The People*, 109 *Ill.*, 504, 520. But that case arose under the act of May 29th, 1879, which was based upon the amendment of the State Constitution adopted in 1878. That amendment, as is said in *Blake vs. The People*, was adopted in order to obviate the effect of the decisions in the Updike and Webster cases. Referring to the corporation whose authority was involved in the Blake case, the court said it was not created to construct drains, ditches and levees, "but simply for the purpose of maintaining and keeping in repair what is known as the 'Sny Island Levee' —a levee claimed to have been made by a corporation purporting to be created under and by virtue of 'An act to provide for the construction and protection of drains, ditches and levees,' approved April 24th, 1871," as to which corporation this court held in *Webster vs. Levee Commissioners* (unreported), following *Updike vs. Wright*, 81 *Ill.*, 49, that the construction of a levee along the river, as an independent work, was not authorized by the Constitution then in force, or said act of April 24th, 1871, and that so much of that act as purported to vest drainage commissioners with power to levy and collect taxes for the construction of drains, levees, etc., was repugnant to the Constitution and inoperative." The question before the court

was as to the powers of the corporation organized under the act of 1879, which was passed in execution of the constitutional amendment of 1878, adopted after the act of 1871 was declared to be repugnant to the constitution of 1870. What was said in the Blake case as to the act of 1871 cannot be taken as modifying the decision in the former cases which was to the effect that the State Constitution stood in the way of all that was done under that act by the Commissioners, the juries or the County Court.

But it is suggested that as the bonds in question were issued before the Updike and Webster cases were decided, it was both the province and duty of the Federal court to determine for itself the constitutionality of the act of 1871, and if in its judgment that act was valid under the Constitution of Illinois, its decree should protect the rights of parties, whatever may have been the views expressed by the highest Court of Illinois upon that question. In support of this view counsel cite numerous cases, among which is *Burgess vs. Seligman*, 107 *U. S.*, 20, 33-35. In that case it appeared that after the determination of a case in the Circuit Court of the United States, the highest court of the State decided two cases adversely to the judgment in the Federal court. Each case involved the same transactions and required a construction of a local statute. The Supreme Court of the United States, upon full consideration, said: "We do not consider ourselves bound to follow the decision of the State court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially

true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the National courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are refered to in the note, but it is not deemed necessary to discuss them in detail. In the present case, as already observed, when the transaction in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit

Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal court was to wait for the State courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. *Pease vs. Peck*, 18 *How.*, 595, and *Morgan vs. Curtenius*, 20 *id.*, 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

We are not aware of any decision of the Supreme Court which materially qualifies the declartion in that case, and we deem it our duty to give it full force in deciding the question now under consideration. In other words, as the act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiffs were issued, it is the province and duty of this court to exercise an independent judgment as to its validity under the Constitution of Illinois. But in doing this there are two principles that should not be overlooked: 1. That although the act of 1871 may not have been expressly the subject of judical construction before the rights of the plaintiffs accrued, this court should give effect to any rules of construction that may have been previously established by the highest court of the State when interpreting similar provisions in the Constitution of 1848. 2. That the Federal courts, for the sake of harmony and to avoid confusion, should "lean towards an agreement of views with the State courts if the question seems to them balanced with doubt," and endeavor to avoid "any unseemly conflict with the well-considered decisions of the State courts," upon questions of local law. These considerations have peculiar, if not controlling, weight when the question to be determined relates to the jurisdiction or power, under the fundamental law of a State, of tribunals or bodies created by legislative enactment and charged with the performance of public duties. As the Supreme Court of Illinois held that the act of 1871 was repugnant to the State Constitution of 1870, so far as it authorized improvements by special assessments through the agency of county courts, commissioners and juries, the Federal court when exercising its independ-

ent judgment should not act upon a different view of the State Constitution, unless compelled to do so by reasons so obviously sound that to refuse to follow them to their logical conclusion would be an absolute denial of justice.

Looking then at the question just as we would do if it had been presented when the bonds were issued, we think that the interpretation placed by the Supreme Court of Illinois upon the State Constitution was justified, if not required, by its decisions relating to a similar provision in the Constitution of 1848.

We have seen that by the 5th section of article 9 of the State Constitution of 1848 it was provided that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;" while the corresponding provision in the Constitution of 1870 was that "the General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Now, it was frequently held by the Supreme Court of Illinois, prior to the passage of the act of 1871, that the above provision of the State Constitution of 1848 was restrictive in its nature, and that the Legislature could not constitutionally confer the power to tax upon any other than the corporate authorities of counties, townships, school districts, cities, towns and villages. *Harward, etc., vs. St. Clair Drainage Co.* (1869), 51 *Ill.*, 130; *Harter vs. Kernochan* (1880), 103 *U. S.*, 562, 570. When, therefore, the State court came to consider the scope and effect of section 9, article 9 of the Constitution of 1870, the rule announced in cases arising under the previous Constitution led, as we think, to the conclusion, announced in *Updike vs. Wright*, and applied in *Webster vs. People*, as to the act of 1871, namely, that the Legislature could invest only "cities, towns and villages" with power to make local improvements by special assessments or impose special taxa-

tion upon contiguous property benefited by such improvement; and that by necessary implication it could not confer that power upon other municipal corporations or upon private corporations. So that when the act of 1871 was passed every one had notice that by the settled course of judicial decision in Illinois the powers conferred by that act upon the county courts, commissioners and juries could not be exercised consistently with the Constitution of the State as it then was. As under the Constitution of 1848 the grant of power to the Legislature to vest the corporate authorities of "counties, townships, school districts, cities, towns and villages," with authority to assess and collect taxes for corporate purposes—such taxes to be uniform in respect of persons and property within the jurisdiction of the body imposing the same—was an inhibition upon the legislature granting power to assess and collect taxes to any other than the corporations or the municipalities or districts to be taxed, so the provision of the Constitution of 1870 declaring that the Legislature could vest the corporate authorities of "cities, towns and villages" with power to make local improvements by special assessments or by special taxation of contiguous property or otherwise, was an inhibition upon any legislation conferring that power upon other municipal corporations or upon private corporations. We therefore hold that the act of 1871, under which the bonds in question were issued, was repugnant to the Constitution of Illinois of 1870; consequently, the bonds were executed without legal authority, and no valid lien was created or exists, by virtue of that statute, upon any of the lands embraced within the territory described in the proceedings instituted in the County Court.

But it is contended that even if the act of 1871 be held to be unconstitutional, the plaintiffs are entitled to relief as against all the defendants who have received a valuable consideration through the statute procured by their own consent, or subsequently sanctioned by them, and by which they derived an interest. Some authorities are cited which apparently support this view. But when carefully examined they do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by the present record. All who had any connection with the passage of the act of 1871, or who desired its passage, acted, as we may assume, in good faith and in the firm be-

lief that its provisions were not inconsistent with the Constitution of the State. It cannot be said that any one was guilty of fraud. No assurances of an affirmative character were given by the land owners to those who constructed the work, or to those who, like Palms, purchased the bonds after they were executed and delivered to the contractors. The land owners, the contractors, and the purchasers of bonds all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. It is a case of an honest mistake as to the competency of the legislature to do what it attempted to do, no one being misled by the assurances and representations of others. The entire argument of learned counsel for the plaintiffs on this part of the case leaves out of view, or assumes to be of no consequence whatever, the fact, apparent on the face of the act of 1871, that what the land owners, proceeding under it, had in view was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things, it cannot be supposed that any land owner would have become connected with the scheme embodied in the act of 1871 unless the *maintenance* of the levee by competent legal authority was assured. It is, therefore, unjust to the land owners to say nothing more than that they assented to the construction of the levee. If they are to be deemed to have assented to anything, it must be further said that they assented to a scheme under which a levee was to be constructed *and maintained*, under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. The system devised by the act of 1871 is to be looked at in its entirety. We cannot put out of view a vital part of it, and hold the land owners who acted in good faith, and who gave no personal assurances or made any representations, responsible for the results to others flowing from invalid legislation and the partial execution of the original plans. If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that the act of 1871 was valid, with equal truth it may be said that the land owners never would have sought or desired such legislation except in the belief that the levee would be maintained by the same authority that constructed it.

In our consideration of this question, we have assumed, in accordance with the allegation of the plaintiffs, that the defendants or some of them "procured" the passage of the act of 1871. But we are of opinion that it is not appropriate to say that the enactment was procured by any individual or individuals. It must be conclusively assumed that the Legislature, although hearing what individuals said on the subject, acted upon its own judgment as to what was proper to be done. It may be that under certain circumstances individuals may incur responsibility by reason of acts or representations on their part under an enactment adjudged to be invalid. But representations made by them to the Legislature in reference to a proposed enactment, or any expression of their desire for the passage of such enactment, cannot be regarded as material in determining questions of responsibility or liability for acts done under or in execution of legislation supposed at the time to be valid but subsequently adjudged to be invalid.

It is said that the defendants are in the actual enjoyment of the work done under the act of 1871, and therefore, they are equitably bound to pay for it. In what sense are they in the enjoyment of such work? There was evidence tending to show—indeed we think the weight of the evidence was—that the levee built under the act of 1871 was not adequately constructed. At any rate, it broke in 1876, and left the lands intended to be benefited in a condition almost as bad as when the act of 1871 was passed. Fences, improvements and houses were washed away, entailing large losses upon land owners. That was the condition of the levee at the time or shortly after the State court in *Webster vs. People*, following *Updike vs. Wright*, declared that act to be unconstitutional. Such repairs as could be made with private means were made by the land owners or under their direction. But the levee again broke in 1880 and a third time in 1881. The amendment to the Constitution having been adopted and the act of 1879 passed, the Sny Levee Drainage District was organized, and that organization and private individuals together had expended prior to 1894, in repairing the levee and in rebuilding parts of it, nearly $500,000. The proof makes it quite clear that the levee work done under the act of 1871 would have been substantially without value for the protection of the land owners but for what they did out of their own means after the break in 1876, and what was

done under the new organization which came into existence under the constitutional amendment of 1878 and the act of 1879. It is true that what remained of the levee constructed under the act of 1871 is in the possession of the Sny Island Levee Drainage District. They received possession in 1880 from the Commissioners appointed under that act. But we perceive nothing in all that was done to justify the contention that the land owners are to be deemed so far in the possession of the work done under the act of 1871 as to place their lands in lien in order to secure the payment of the bonds in suit. Their lands could not be specially assessed under the void act of 1871; nor, did the bondholders have the right, by reason of anything done or proceedings taken under that act, to charge such lands with liability for the amount of the bonds. Here was a broken levee, and, after the decisions in *Updike vs. Wright* and *Webster vs. People*, an entire absence of valid legislation under which the land owners could unitedly act for their protection. Nothing was left for them except to proceed under the act of 1879. Some of them did so, and caused the organization of a new body which could proceed legally for their protection. That body could not have removed the work done under the act of 1871, and the Commissioners appointed under that act were without power or means to proceed. There was nothing to be done except for the new body to put the old levee in safe condition. But that act of the new organization could not have the effect to subject the lands inside of the old levee to assessment or to a lien for the payment of the debt that was created by the old organization without authority of law. If the land owners get some benefit from that part of the old levee which stood when the new body was organized; it was because it was there and could not be removed. As the special assessments under the act of 1871 were without authority of law, no equitable right could arise against the land owners and in favor of the bondholders to have the lands of such owners sold to pay the amount of the bonds. The money paid by the plaintiffs' testator for the bonds did not go into the hands of the individual land owners, nor were they applied in the direct improvement of the lands specially assessed. It went to the contractors, and while we may assume that it was used by the contractors in building the old levee, that fact cannot justify a decree ordering the lands so assessed under

a void statute to be sold for the benefit of bondholders. The argument in support of such a decree overlooks the fact that if the land owners are to be deemed to have procured or assented to the proceedings under the act of 1871, they did so upon the condition that a levee was to be built *and maintained* under the authority of that act. That condition failed, because, contrary to the expectation of all interested in them, those proceedings were adjudged to be without the sanction of law.

A case quite in point is that of *Litchfield vs. Ballou*, 114 *U. S.*, 190, 194. Ballou held bonds issued and sold to him by the city of Litchfield, Illinois. The money received from him for the bonds was used by the city to aid in the construction of a system of water works of which it was the owner. In a suit between the city and another holder of bonds of the same issue, the bonds were held void because issued in violation of section 12 of Article 9 of the State Constitution. Ballou then sued in equity, alleging that although the bonds were void the city was liable for the money it received of him, and as by the use of that money the water works were constructed, he prayed for a decree for the amount, and, if it was not paid within a reasonable time, that the water works of the city be sold to satisfy such decree. Among other allegations in the bill was one to the effect that he was misled into purchasing the bonds by the false statements of the officers, agents and attorneys of the city that the bonds were valid. It appeared in proof that much the larger part of the money for which the bonds were sold was used to pay the contractors who built the works. The Supreme Court held that the action could not be maintained, saying among other things: "But here also the decree departs from what is now asserted to be the principle of the bill. Having decreed an indebtedness where none can exist, and declared that complainant has a *lien* on, not the ownership of, the water works, it directs a sale of the water works for the payment of this debt and the satisfaction of this lien. If this be a mode of pursuing and reclaiming specific property into which money has been transmuted, it is a new mode. If the theory of appellee's counsel be true, there is no *lien* on the property. There is no debt to be secured by a lien. That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the

property of complainant, into which *his* money, not the city's, has been invested, for the reason that there was no debt created by the transaction. The money received on the bonds having been expended, with other funds raised by taxation, in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received. The holders of the bonds and agents of the city are *particeps criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared."

Another case that is instructive on the point under consideration is *Aetna Life Insurance Co. vs. Middleport*, 124 *U. S.*, 534, 546-548. That was a suit in equity by an insurance company as purchaser and holder of bonds payable to bearer issued by a township in Illinois in conformity with a popular vote authorizing a tax to aid in the construction of a railroad. The bonds were held to be void, because issued without authority of law. The theory upon which the suit was brought was that by the issuing or delivery of the bonds to the railroad company, and by their sale to the plaintiff, the latter was thereby subrogated to the rights of action which the railroad company would have on the contract evidenced by the vote of the town and the acceptance and fulfillment of the contract by the railroad company. The Supreme Court held that there could be no subrogation. That court said: "In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road. The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no

right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds. * * * One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor. * * * The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company."

We are of opinion that the plaintiffs are not entitled upon principles of equity to reach the lands of the individual defendants in order to secure the payment of the bonds in question. The bonds were issued without authority of law, and there was nothing in the acts or conduct of the defendants that estops them from alleging the invalidity of the act of 1871, or which creates an equity in the bondholders to enforce or have the benefit of any special assessments made under that act. The plaintiffs can take nothing, as against the individual land owners, defendants in this cause, by reason of any order made in the suit instigated by Palms in the Circuit Court of the United States against the Commissioners designated under the act of 1871; for the present defendant land owners were not parties to that suit, and could not be concluded by any order made in it. It is evident from the orders entered in that case that Judge Drummond did not intend to pass upon the rights of the land owners, but was of opinion that if Palms had any ground of action against them, in respect of the lands attempted to be specially assessed under the act of 1871, he must bring them before the court by supple-

mental bill. He was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a court of equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate because it is provided by statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the time it becomes a lien, except upon the revival of the same by *scire facias;* and that an action to recover real estate shall be barred by seven years' residence thereon under a title of record, etc., by seven years' adverse possession under color of title and payment of taxes, or as to unoccupied land by seven years' payment of taxes under color of title. *2 Starr & Curtis' Anno. Stat. (Ill.)* c. 77, § 6, c. 83, §§ 4, 6 and 7, pp. 1386, 1538, 1547. In this case most of the defendants made proof of adverse possession. Besides, as said in *Johnston vs. Standard Mining Co.*, 148 *U. S.*, 360, 370, "the mere institution of a suit does not of itself relieve a person from the charge of laches," and "if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun."

But without discussing the adjudged cases upon the subject of laches, and passing many questions discussed by counsel and which we deem it unnecessary to decide, we affirm the decree of the Circuit Court upon these grounds: 1. The act of 1871 was repugnant to the Constitution of Illinois of 1870. 2. The bonds issued under that act were void. 3. The lands intended to be benefited and protected by the levee constructed under the act of 1871 could not be specially assessed by any action taken in conformity with the provisions of that act. 4. Nothing was done or said by the owners of the lands, so intended to be benefited and protected, that estopped them to dispute the validity of the act of 1871 and of all that was done under it, or that created any equity in favor of the holders of bonds to have

said lands sold to pay any special assessment or the bonds issued to contractors.

Decree affirmed.

Judge Showalter participated in the hearing, but not in the decision of this case.

July 4, 1899. Petition of appellants for rehearing.

March 2, 1900. Order of United States Circuit Court of Appeals overruling petition for rehearing.

SUPREME COURT OF THE UNITED STATES.

MICHAEL W. O'BRIEN, et al., Executors,
Petitioners,
vs.
JOHN G. WHEELOCK, et al.,
Respondents.

To the Honorable the Supreme Court of the United States.

Your petitioners, Michael W. O'Brien, Francis F. Palms and Clothilde Palms Book, born Palms, respectfully show unto the Court:

I. That they are the executors of the last will of Francis Palms, lately deceased, of the City of Detroit, and are citizens of the State of Michigan and the defendants, who number about one thousand, are respectively citizens of the States of Illinois, Missouri and other states of the United States than the State of Michigan.

II. Your petitioners by leave of the Circuit Court of the United States for the Southern District of Illinois, in Equity, filed a bill in the nature of a bill of revivor under which the proceedings therein and in the United States Circuit Court of Appeals for the seventh circuit hereinafter stated were had; that as they are advised by counsel the questions involved in said proceedings and hereinafter more particularly stated are of gravity and importance and of general interest upon which uniformity of decision is desirable.

III. The case grows out of the construction of a levee across the Sny Cartee Slough and along the banks of the Mississippi river, in the State of Illinois, from a point in the Township of Fall Creek, Adams county, through Pike county, terminating in Hamburg township in Calhoun county, a distance of about 52 miles, and with a height up to the high water mark of the Mississippi river of 1851. The levee has, during and since its construction, been at all times in the possession and custody of the defendants and their ancestors and assignors through commissioners of their own choosing. It has remained unbroken since 1888, and has grown as solid and secure as a natural embankment. Under the protection of this levee upwards of one hundred thousand acres of land which, before the levee was built were not worth fifty cents an acre, are now worth twenty-five dollars and upwards, and yield most bounteous harvests, one year's crops of which would more than pay the entire cost of the levee.

The amount involved is upwards of eight hundred thousand dollars.

IV. Complainants' bill seeks to enforce against defendants' lands the several assessments levied thereon for the cost of constructing said levee under the provisions of an act of the Legislature of the State of Illinois, hereinafter stated. It is not a bill to enforce contributions to, or collect proportionate amounts of, a gross sum, but simply a bill in the nature of a bill of foreclosure to enforce the liens of several and specific assessments levied on several and specific parcels of lands upon the faith of which assessments the moneys which built the levee were advanced.

The case is not upon a bill to collect a tax and is not within the decisions of Berkley vs. Levee Commissioners,

93 U. S., 264, and Thompson vs. Allen, 115 U. S., 550.

It is entirely different from Litchfield vs. Ballou, 114 U. S., 190; Aetna Life Insurance Co. vs. Middleport, 124 U. S., 534, and cases of like character, in that the complainants in this case do not seek to hold any municipal corporation liable, directly or indirectly, at law or in equity, but simply ask the enforcement of certain assessments against the lands of individual defendants, on the ground that those defendants have so conducted themselves in the premises, that they are estopped to allege any invalidity in the law providing for said assessments.

The federal courts can enforce liens created by State laws and have repeatedly done so.

> Fitch vs. Creighton, 24 How., 159, a street opening assessment.
>
> Idaho & Oregon Land Improvement Co., 132 U. S., 509, a mechanic's lien.
>
> Jones vs. The Great Southern Fireproof Hotel Co., ubi sup.
>
> Hagar vs. Reclamation District, 111 U. S., 701, a levee lien.

The bill implies the possibility, and the evidence shows, that in some cases the assessments may not be collectible because the land owners in those cases have not by their conduct or acts estopped themselves to deny the invalidity of the statute. On this account the original bill filed by Mr. Palms listed separately in the bound book, Exhibit "A," each description of land assessed, the name of the owner, and the amount of the assessment.

In the present bill complainants in Exhibit "X" list the same descriptions of land, the same assessments thereon, and the names of the owners at the date of the assessment as in Exhibit "A," with the addition of the names of the owners at the time of filing this bill. The charges in the

bill are proven by admissions of defendants and by carefully prepared abstracts of title (Record, p. 377), introduced in evidence under a stipulation that they may be received with the same force and effect as the deeds referred to in them (Record, p. 113).

While the proofs are sufficiently full and explicit, to point out and authorize a decree in detail against each of the particular descriptions of lands of the several defendants, whom the Court may find estopped to attack the validity of the assessment, it would involve a long and detailed examination of the testimony, which is very voluminous. Believing this to be the appropriate function of a master under an order of reference declaring the rule of liability, counsel did not ask it of the court below, but submitted short lists of certain typical defendants, whom they claimed to be estopped, with the several descriptions of their lands and the amounts of the respective assessments thereon. (Appendix A to this petition gives a copy of such lists.)

V. The assessments which are sought to be enforced, and from the proceeds whereof complainants ask the payment of the bonds held by them, were levied under the provisions of an act of the General Assembly of the State of Illinois, approved April 24, 1871, entitled, "An act to provide for the construction and protection of drains, levees and other works."

The act is printed in full in the record, pp. 394 to 404.

Its substance is stated in the opinion of the Circuit Court of Appeals.

It is sufficient here to state that the act provided a mode by which drains, ditches, levees and other works which were necessary for sanitary or agricultural purposes might be, upon petition of land owners and occupants, con-

structed by means of the appointment of drainage commissioners and other proceedings in the county courts of Illinois and paid for out of the proceeds of assessments upon the several descriptions of lands benefited.

The act is carefully framed. It requires damages to be *paid* before taking lands for the work, and gives resisting land owners, a hearing before court and jury on all material questions, and affords every safeguard against injustice.

Section 27 of the act provides that when the Court shall confirm the assessments of benefits by the jury it may order the whole amount to be paid immediately or to be paid in installments, and said assessments "shall be a lien on the lands assessed until paid."

Section 35. Empowers the commissioners to borrow money for the construction of the work and give therefor notes or bonds, drawing interest not exceeding 10 per cent, "which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessments for the repayment of the principal and interest thereon."

Section 39 provides: "Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners—or any owner or occupant of lands affected by the work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter or enlarge, cleanse, protect or maintain any drain, ditch, levee or other

work, constructed by virtue of this chapter."

VI. Under Section 35, above quoted, bonds* were issued by the commissioner of the Sny Levee Drainage District in 1872 and 1875—$499,500 under the assessment of 1872, and $148,500 of the issue under the second assessment of 1875. (Record, p. 81.)

Mr. Palms, relying on the statute and the good conscience and sense of justice of the land owners who would be benefited by said levee, purchased $202,500.00 of the bonds issued in 1872. (Record, p. 372.) Interest was paid to him on the bonds of this issue for the years 1873 and 1874. (Record, p. 372.) A subsequent assessment, to supply a deficiency in that of 1872, was made by the Commissioners in 1875, and Mr. Palms bought all the bonds issued thereunder, amounting to $148,500. It is proven beyond dispute that the location and construction of the levee was paid for by the proceeds of these and other bonds issued by the Commissioners. (Record, p. 81.)

VII. Before the passage of the act of April 24th, 1871, the several tracts of land described in Exhibit "A" constituted a body of land of an average width of from three to five miles, extending fifty-two miles from the mouth of Fall Creek, in Adams County, to Hamburgh Bay, along the east bank of the Mississippi, and between it and the bluffs or high water mark of the river, containing one hundred and ten thousand acres. They included the greater part of several congressional townships, and if reclaimed and protected from periodical overflows of the Mississippi River, would be fertile and healthy.

*These are not bonds in a strict sense but are in legal effect similar to the instruments in New Orleans vs. Warner, 175 U. S., 120, brought up to this court by certiorari.

Efforts of Land Owners to Construct a Levee.

The map of the improvement attached hereto is a copy of the one made under the charge of the engineer of the Drain Commissioners, showing the course of the levee and the surrounding lands, found in the record between pages 384 and 385.

From their proximity to the river and to the City of Quincy, a few miles north, and the cities of Hannibal, Louisana and Clarksville, and the valuable cultivated lands in the neighboring region of Illinois and Missouri, they had attracted in an unusual degree the attention of persons seeking homes and others seeking speculative investments. While these bottom lands were sparsely populated, many persons residing on the high lands in the counties of Adams, Pike and Calhoun, in Illinois, and in the cities of Hannibal, Louisana and Clarksville, in Missouri, had bought large bodies of said lands, expecting they would be reclaimed and protected by levees and be made productive and greatly increased in value.

VIII. The protection of these lands by levees had, for many years before the passage of the act of April 24th, 1871, been the subject of consideration and discussion among the owners and occupants thereof as well as among those who knew their condition and their prospective value, and several attempts to construct a levee had been made, but failed, so that before the passage of the act of April 24, 1871, owners and occupants and persons interested in said lands well knew that an act of the Legislature of the State of Illinois was absolutely necessary under the provisions of which the owners and occupants of the lands could be united and a common agency created and authorized to make all necessary plans, estimates and contracts for the construction of a levee, and to borrow money therefor by the issue of bonds or otherwise, to

be secured and paid by assessments on or pledges of the lands benefited.

It resulted that during the session of the Legislature of Illinois in 1870 and 1871, the defendant Charles N. Clark, with money advanced for the payment of his expenses by other defendants named, and with the knowledge and approval of all the then known occupants and owners of said lands, procured from the Legislature of the State of Illinois the passage of the act of April 24th, 1871, which said owners and occupants believed and expected would effect the reclamation and protection of said lands. (Clark's testimony, Record, p. 58 et seq., 77 et seq.) Immediately after the passage of said act the defendants, who were the owners and occupants of lands described in said Exhibit "A," availed themselves of the provisions of the act and for the information of all interested caused it to be published at length, or in its substantial parts, in the Hannibal Courier and Pike County Democrat and other newspapers which were published and circulated in the cities of Quincy, Hannibal and Louisana, and Clarksville and Pittsfield, and also had a large circulation among the owners and occupants of said lands. In addition to these publications, public meetings, called and extensively advertised by Clark and others named in the proofs, were held at various prominent points in the district of lands intended to be reclaimed and protected, and in its immediate neighborhood. At these meetings, which were largely attended, Clark and others interested read and explained the provisions of the act of April 24th, 1871, which were approved and accepted by the owners and occupants of said lands, and they devised a plan for a corporation to be organized by them with a capital stock of $100,000 to raise the money to put said act into effect. (Clark's testimony, ubi sup.)

Organization of Mississippi Levee and Drainage Company. Petition for First Assessment.

By the means above mentioned all of the owners and occupants of the lands and the persons interested in them were fully informed of the passage of the act and of the steps being taken under its provisions for the reclamation and protection of the lands. Many of the then owners and occupants of lands who are defendants to this suit are shown by the proofs to have organized and subscribed to the capital stock of this organization as shown by the Articles of Association and list of subscribers, which are in the proofs. (Transcript p. 2124.)

IX. Acting under these laws, certain of the defendants, within the provisions of the Act of 1871, filed at the August term, 1871, of the County Court of Pike County, a petition under said act (a copy of which is given Record, pp. 442-447), in all respects conforming to the requirements thereof, and praying for the appointment of commissioners in the premises. Due notice of the filing of such petition was given, and at its September term, 1871, the said County Court of Pike County found that the proposed work was necessary and useful for the drainage of the lands, and appointed William Dustin, George W. Jones and John G. Wheelock, Commissioners, who duly qualified and organized as the Sny Island Levee Commissioners. (Record p. 79.)

On the 23rd of November, 1871, these Commissioners filed a full report, answering all the requirements of the statute, accompanying it with the surveyor's estimates and report, a map of the district, and the profile of the work to be done, made by a competent engineer.

X. At the December term, 1871, of said Pike County Court, due proof of notice to all concerned was made, and the report of the Commissioners *was duly approved and confirmed without objection by anyone.* A jury was

ordered impaneled and duly sworn to examine the lands, assess the damages and benefits, and make out a proper assessment roll. (Record pp. 79 and 391. Profiles in transcript, but under stipulation not printed.)

The order summoned a jury of 12, although the act only required a jury of 6. This cured any objection to that provision in the act. (Campau vs. Detroit, 14 Mich., 376.)

The proceedings of the jury were regularly had upon due notice to all the parties interested, their report and assessments filed with the Court, and spread upon the record. Certain appeals were taken from these assessments, but as to all the others it was confirmed, and spread upon the records. The Court directed that the assessments be paid in ten annual installments, commencing in 1882 with interest from the first day of October, 1872. Certified copies of said order for Pike, Adams and Calhoun Counties, were made by the Commissioners and were recorded in said counties on or before December 18th, 1872. The Commissioners acquired the title to the lands required for the site of the levee, and in reliance upon said assessments, contracted for the construction and completion of said levee, issued bonds under an order of the Count to the amount of $499,500 (testimony of Geo. W. Jones, Commissioner, Record p. 81), and used them to construct the levee. The complainants' testator purchased $202,500.00 of said bonds.

XI. Subsequently it became necessary to raise an additional sum to complete the levee and a second petition was filed and proceedings similar to the first were had thereon, resulting in additional assessments of $148,500. Upon these assessments the Commissioners issued under orders of Court and sold to the complainants' testator

through the contractors who built the levee, bonds to the amount of $148,500.00 and expended the same in the construction and completion of said levee. The complainant's testator purchased said bonds, relying on the facts before mentioned and upon the further fact that the Commissioners had paid the interest for the years 1873 and 1874 on the bonds which he held.

XII. The contractors constructed the levee in accordance with their contract and the plans and specifications and surveys of the Commissioners, and to the approval of the engineer in charge (testimony of Jones ubi sup.; E. L. Corthell, Record p. 365; H. W. Parkhurst, Record p. 344) to such a hight that the lands were protected from overflow by the Mississippi River and were reclaimed and rendered healthy and productive. (Testimony of Corthell, Parkhurst ubi sup.) The Commissioners made some effort to collect some installments of interest on said assessments, under the section of the act of 1872 providing for the collection of said assessments "in the same manner as State and County taxes" which were resisted by certain land owners, and in January, 1876, the Supreme Court of Illinois, after said levee was wholly constructed, in Updyke vs. Wright, 81 Ills., 49, and Webster vs. People, unreported, refused to enforce their collection on the ground that the law of 1871 was unconstitutional because the act was not within Section 31, Article IV, of the Constitution of the State, and because the General Assembly of Illinois had no power under Section 5, Article IX, of the Constitution of the State to vest the Commissioners or jury selected or the County Court with authority to assess and collect taxes or special assessments for the contemplated improvement.

Trust Deeds to Commissioners.

XIII. Although the whole amount of complainants' bonds and those of others were unpaid, the Commissioners continued in possession of said levee, and by the use of it protected their own lands and the lands of the other defendants from overflow, at the request of the land owners, certain of whom provided a fund for keeping the levee in repair by conveying to said Commissioners, by deeds of trust, about thirty thousand acres of land.

The trust deeds described the grantees therein as "Commissioners appointed by the County Court of Pike County under and by virtue of" the Act of April 24, 1871; recited the construction of the levee under said act and the decision of the Supreme Court of Illinois against the validity of the assessments, and authorized the trustees within certain limitations to assess, on the lands thereby conveyed annual assessments up to fifty cents per acre for such amounts as were deemed by the Commissioners necessary to maintain and keep in repair said levee, but forbade the assessment of any sum to pay for the construction of the levee. Under these deeds much money was raised and expended upon the levee. (Trust deeds, Record p. 460). The answer admits $30,000. (Record pp. 55-33.)

XIV. Not before the 26th day of January, 1887, did the Commissioners cancel and release these trust deeds, and then this was done in pursuance of another and more extensive scheme for the continuance of said levee and the defeating of the complainants from recovering the moneys furnished by him for the construction of the levee, namely, the organization of the Sny Island Levee Drainage District, hereinafter more fully described.

XV. In the meantime, on the 4th day of May, 1878, while these trust deeds were in force and the Sny Island

Levee Commissioners were collecting moneys by means thereof, Francis Palms, the complainants' testator, filed a bill on behalf of himself and others against the Sny Island Levee Commissioners in the Circuit Court of the United States for the Southern District of Illinois in equity. It is the original bill to which the bill in this suit is supplemental and in revivor.

The bill charged more fully and at length the facts hereinbefore stated, with the additional averments that all the owners and occupants of the lands assessed had full knowledge that the entire expense of said levee was paid for by said Commissioners out of the money received from said Palms and other purchasers of bonds. (Record, p. 410; statement of contents of same, Record, pp. 9-14.) In it Complainant Palms prayed among other things for a decree for an accounting of the moneys received from him by the Commissioners as aforesaid and used in the construction of the levee and the interest thereon; that he have for such amount a lien upon the levee and works and the lands acquired by the Commissioners for the site thereof and upon the assessments and interest thereon upon the other lands described in Exhibit "A;" that the Commissioners be ordered to proceed to collect said assessments and interest under the order and direction of the Court; for the appointment of receivers to take charge of said levee and all books and papers of said Commissioners and to collect under the direction of said Court said assessments and interest; and for other and further relief. (Record pp. 13 and 19.)

XVI. The defendant Commissioners, on the 13th day of March, 1879, filed their answer to said bill, admitting

substantially all the material allegations therein and specifically admitting that they had accepted the levee when it was completed by the contractors, and received it as a complete levee, sufficient in hight and strength to protect said lands from overflow. (Original answer, Record p. 429; statement of contents, Record pp. 14-16). In said answer they claimed that because of the registration of said bonds with the Auditor of Public Accounts of the State of Illinois that the bond owners had thereby elected the mode prescribed by the supplemental act of 1872 for the collection of interest on said bonds and that they, said Commissioners, were by said election relieved from the duty of looking after the same, and were not responsible for the failure to collect the moneys to pay said interest, and were without any duty to perform in respect to said assessments. That certain land owners had at all times opposed the proceedings which subjected their lands to assessments for benefits on account of said levee, and had refused to pay interest accruing on said assessments, and because of this, other land owners otherwise inclined to pay their assessments, saw the futility of so doing, unless payment could be enforced against all alike, which resulted in a return by the township collector of all or nearly all of said land owners as delinquents. Thereupon the County Collector made application for judgment on assessments against said delinquent lands to the Pike County Court, and some of the land owners so opposing said assesssments filed objections to the judgment, setting up that the law under which the assessments were imposed, was unconstitutional. That the Commissioners employed counsel and the County Court gave judgment against the lands. The resisting land owners appealed to the Circuit Court, where the judgment below was again

confirmed. Thereupon the resisting land owners appealed to the Supreme Court of the State, stipulating that one appeal should be decisive of all assessments. The defendant Commissioners employed eminent counsel on the argument of the case in the Supreme Court, and upon full argument said Court decided adversely to the right to collect said assessments.

Thereupon they petitioned for a re-argument of said cause, but their petition was overruled, and the final judgment rendered by the Supreme Court was adverse to the right to collect said assessments, and they submitted that the decision of said case was decisive against any right upon their part to enforce any payment of any assessments in any manner.

They also averred that "as Commissioners they are not now, and never have been in any actual possession of any part of said levee, except for the purpose of constructing, maintaining and repairing the same; and they are advised and believe they never had title to any portion of said levee on account of the unconstitutionality of the law under which said work was done; and since said law was declared unconstitutional these respondents have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair."

XVII. Thereupon, on March 13th, 1879, the said cause was set down for hearing upon bill and answer, and after argument and consideration by the Court, the United States Circuit Court for the Southern District of Illinois, in Equity, Judge Drummond presiding, entered a decree

containing among other matters the following provisions:

"That the defendants retain the right of way, levee and other works, and keep and preserve and protect the same under the order and control of this Court for the benefit of the complainants and all other persons interested therein."

"That the complainants, and all other persons who may have advanced money to the defendants for the right of way, for the construction of said levee and other works, or who may be the holders of any of the bonds issued by the defendants to raise money for the purposes aforesaid, who may come into this suit and contribute their proper proportion for the expenses thereof, have liberty to go before the Master and produce their bonds and coupons, and make proof of the amount due them of principal and interest."

Said decree referred the cause to John A. Jones, Master in Chancery, to take proofs, upon proper notice, of the amounts due the complainants, and other parties, and to make report to the Court with such proofs of the amounts found due by him to each and every party who appeared before him, with the grounds of his several findings, and also provided that after the coming in of said report, and the approval thereof by the Court:

"The said complainant, and other persons, have the liberty to exhibit and file their supplemental bill or bills against any or all of the present or former owners of the lands alleged in said bill to be benefited by said levee, to compel them to contribute to the payment of the amounts found due, as aforesaid, and for such other and further relief as they may be advised they are entitled to," * * * "and the said complainant is at liberty to use the names of the defendants in such supplemental bill if they are ad-

vised it is necessary for them to do so upon tendering sufficient indemnity." (Record, pp. 437, 438.)

XVIII. Afterwards, on July 7th, 1880, a further decree was rendered in said cause, overruling the exceptions of defendants to said Master's report, and confirming and approving the same and adjudging the amounts due to the complainants' testator.

Said decree further declared "that the several sums of money so found due are a lien upon the assessments made under the order of the County Court of Pike County, upon the lands described in the bound book (Exhibit "A") with complainants' bill, and upon the said lands as provided in the 27th and 37th Sections of an Act of the General Assembly of the State of Illinois entitled "An Act to provide for the construction and protection of drains, ditches, levees and other works," approved April 24th, 1871, "and it further appearing to the Court that the defendant Commissioners have no money in their hands for the payment of the amount so found and adjudged to be due the said several complainants, and it also appearing to the Court from the allegations of the complainants' bill, and not denied by the defendants in their answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the Court that the complainants have the right and liberty to proceed in this Court in the names of said defendants as complainants as such Commissioners or in their own names as complainants against the lands described in said Exhibit "A," and the owners thereof, or such lands and the owners thereof, and other persons

and said Commissioners, as they may be advised are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original or supplemental or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit." (Record, pp. 438 to 441.)

XIX. After the decision of the Supreme Court of Illinois in the Webster case, and after the filing of this original bill by Palms, and while the last mentioned decree was in full force and the Commissioners were in possession of the levee, the People of the State of Illinois, at an election held November 5, 1878, adopted an amendment to Section 31 of Article 4 of the Constitution of the State, to read as follows:

"The General Assembly of Illinois may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authority thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by a special assessment upon the property benefited thereby. (Star & Curtis' Annotated Statutes of Ills., p. 122.) This amendment was proposed in the Legislature of Illinois by one of the defendants. (Record, p. 87.)

Under the authority of this amendment the General Assembly of the State of Illinois passed "An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes and to pro-

vide for the organization of drainage districts." Laws of 1879, p. 120, Starr & Curtis' Annotated Statutes, p. 919. The answer in this case admits that the submission of this amendment and its adoption by the people, and the passage of this statute was secured in part by the efforts of some of these defendants. (Record, pp. 55-33.) The act was introduced by one of the defendants in this case. (Record, p. 87.)

It took effect May 29, 1879. It provided for the formation of drainage districts and invested them when formed with the power not only to construct drains, ditches and levees for agricultural, sanitary and mining purposes, but also to maintain and keep in repair any such drains, ditches or levees "heretofore constructed under any law of this State." Section 2. And in cases where a levee had been theretofore biult "under any law of this State," the annual assessments for keeping the same in repair were made due and payable on the first of September. The Supreme Court of Illinois say, in Blake vs. People, 109 Ill., 504, that "the only law to which this could refer was the" (levee and drainage) "act of April 24, 1871."

XXI. Thereafter, on the 26th day of January, 1880, a number of land owners, whose lands were described and included in the original assessments for the construction of the levee and in the original bill filed by Francis Palms, filed a petition, conforming in substance to the requirements of said last mentioned act. In said petition they describe the route and terminus of the said levee, alleging that this levee "was constructed under the laws of the State of Illinois, then in force in the Counties of Adams, Pike and Calhoun, in the years 1872, 1873 and 1874." They

further allege that "by proper repair and maintenance of said levee, the lands aforesaid" (being part of the lands described in the original bill of Palms and in the bill filed by his executors, amounting in the aggregate to about 90,000 acres) "would be reclaimed and brought into cultivation, and that, in addition, it would greatly improve the sanitary condition of the locality through which said levee passes." They also alleged that it was absolutely necessary for the health and proper drainage and protection of said land, that said levee be repaired as speedily as possible. In this petition the descriptions of lands to be benefited or damaged by the repair and maintenance of said levee so far as they went, were substantially the same as those contained in Exhibit "A" to the original bill of Mr. Palms. They then prayed that a drainage district, to be known as the Sny Island Levee Drainage District, be formed out of the said lands subject to periodical overflow by the Mississippi river in the townships aforesaid, for the repair and maintenance of said levee, according to the statute, and that commissioners be appointed with the powers and authority named in the Act of May 29th, 1879, and that they be directed to do all acts provided in said law for repairing levees, ditches and drains from assessments to be ordered, and for other and further relief. (Answer of defendants, pp. 55-34 bound book, Exhibit "10," Record, p. 499.)

Such proceedings were had thereon that the County Court of Pike County, by all necessary and legal orders, duly created the Sny Island Levee Drainage District, which, in the year 1880, received the surrender of the levee from the original Sny Commissioners, and took pos-

session and control of the levee and other works, and still has control and possession thereof, with the knowledge and consent and approval of the defendant Commissioners in the Palms suit, and of all the defendants in this suit, who had also notice that the said levee had been built in part by the money received for that purpose from said Francis Palms. (Answer of defendants, Record, pp. 55-34, bound book.)

XXII. On the 24th day of November, 1886, the complainant in the original suit died, and on the 4th day of January, 1889, the complainants in this suit, who had qualified as executors and trustees under his will, were authorized to continue the prosecution of said suit, and filed the present bill by leave of court.

The complainants are still the owners and holders of all the bonds described in the original bill of said Francis Palms, deceased, and in the report of the Master as aforesaid, and the defendants have not paid any moneys whatsoever on acount of the said bonds or the interest thereon. (Testimony of Mr. O'Brien, Record, p. 372.) The bonds belonging to the complainants which have become due are again specifically produced and proved. The installments of the first assessment in 1872, which fell due prior to the filing of this bill in 1889, were for $50,000 in each of the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, aggregating $350,000. (Record, p. 22.) None of the installments of the assessment of 1875 were due when the present bill was filed, as this assessment was made payable in 1892, 1893 and 1894.

XXIII. It appears from the proofs that the defendant Commissioner Westlake died and no successor has been

appointed to fill his place, but the other defendants, Wheelock and Jones, have remained Commissioners as aforesaid.

The proofs also show that very many, if not all, of those of said defendants who have acquired title to any portion of said lands since the levying of the assessments of 1872 and 1875, respectively, took the same with full notice of the existence of such assessments, and the proceedings in the Pike County Court in relation thereto, and the issue of bonds by the Commissioners, and the sale thereof to complainants' testator, as well as notice of the expenditure of the proceeds thereof in the construction of said levee, and that the levee was constructed solely with the money thus furnished by complainants' testator and others, and that those moneys have not been repaid. They also show that the defendants, with like knowledge and notice, have appropriated and used said levee in the protection of their lands from overflow by the Mississippi river, for a long time past, and still so appropriate and use the same, but none of the defendants have, since the years 1873 and 1874, ever contributed any sum of money whatever for the reimbursement of complainants' testator for the moneys advanced for the construction of said levee.

XXIV. They show that certain defendants participated in the issue and sale of said bonds to complainants' testator, and in causing said proceeds to be expended in the construction of said levee by actively soliciting and procuring the passage of the act to provide for the construction of levees, approved April 24th, 1871. That certain other defendants participated in causing the bonds to be issued and sold and the proceeds expended in the

construction of the levee by subscribing to the stock of the Mississippi Levee Drainage Company, organized for the purpose of giving effect to the act of April 24, 1871, and to raise money to do the necessary work prior to the steps taken in the County Court for Pike County. (Clark's testimony, Record, p. 59.) That certain other of the defendants are purchasers with notice from last described land owners.

XXV. That all the defendants who acquired title to the lands now claimed by them since May 4th, 1878, are purchasers with notice because the original bill of the complainants' testator was filed on that day, and is still pending and of record in this Court; that in addition to the pendency of said bill the decrees thereupon of March 13, 1879, and July 7, 1880, putting the levee into the hands of the Commissioners as receivers were full notice of the complainants' equities, to any subsequent purchasers of the lands in question.

XXVI. That certain of the defendants participated in causing the bonds to be issued and sold and the proceeds expended in the construction of the levee and in causing the assessments to be made on the lands benefited by said levee (specifically described in Exhibit "A") by signing and presenting the original petition for the construction of said levee to the Pike County Court in August, 1871. (Record, pp. 55-40, original petition; Record, pp. 442 to 447.)

That certain other defendants are purchasers with notice from the last named defendants.

XXVII. That certain other defendants participated in procuring the issue and sale of said bonds and the expenditure of the proceeds thereof in the construction of the

levee and in causing the lands to be assessed by order of the Pike County Court by filing on the 30th day of November, 1874, the petition for the second assessment in 1875. (Record, pp. 55-40.)

That certain other defendants are purchasers with notice from some of the last named defendants.

XXVIII. That certain other of the defendants, well knowing that the levee had been constructed with the moneys of the complainants and others, and that the amounts of complainants' bonds and interest thereon were wholly unpaid, and knowing and consenting to all of the proceedings of the Pike County Court, and having authorized the assessments of their lands for the payment of the principal and interest of said bonds, combining with the defendant commissioners, whose duty, as said defendants well knew, it was to collect said assessments and pay the amount thereof to the complainants in discharge of the principal and interest of said bonds and for the purpose of defeating the just claim of defendants, procured the defendant Commissioners to take exclusive possession and control of the said levee as their agents and use and appropriate the same to the protection of their lands with the powers and under the provisions of certain trust deeds, which said trust deeds stipulated that no part of the funds collected by means thereof should ever be applied upon the indebtedness created by or on account of the original construction of said levee. (Record, pp. 55-41.)

That certain other defendants were purchasers with notice from some of the last named defendants.

Acts of Estoppel of Land-owners—Constitutional Amendment—Organization of Sny Island Levee Drainage District.

XXIX. That certain other defendants actively participated in procuring the submission by the Legislature of Illinois and the adoption by the people of the constitutional amendment of 1878 and the passage of the act of May, 1879, under the provisions thereof.

XXX. That certain other defendants filed the petition in the Pike County Court for the creation of the Sny Island Levee Drainage District and were parties to the proceedings therein. (Record, pp. 55-41, 55-48.)

That certain other defendants are purchasers with notice from some of the last named defendants.

XXXI. That certain other defendants were interested in the lands in which they are now interested and which are described in Exhibit "X" on the 26th day of January, 1880, and in pursuance of the statute were severally made parties to and had due notice of and are bound by all of the proceedings for the organization of said Sny Island Levee Drainage District.

That certain other defendants are purchasers, with notice from some of the defendants last named.

XXXII. That certain other defendants are heirs-at-law of ancestors or devisees and legatees of persons who took part in some or all of the proceedings before mentioned, by which said bonds were issued and assessments levied and the levee constructed.

XXXIII. That certain other defendants have acquired title to the lands in which they are now interested as set forth in said Exhibit "X" through deeds of conveyance expressly recognizing and agreeing to pay the liens of the assessments upon said tracts of land for the amounts ad-

vanced by complainants' testator for the construction of said levee and other works.

XXXIV. That every one of the defendants have by the payment of assessments by themselves or their grantors, made upon their lands by the said Sny Island Levee Drainage District, having at the time of such payment full knowledge that the levee and other work were constructed with the funds furnished by complainants' testator and of the decrees of this court of March, 1879, and July, 1880, declaring a lien in favor of the complainants' testator, and also having full knowledge that no part of the amounts due to the complainants had been paid, approved and ratified the acts of said Sny Island Levee Drainage District in appropriating the said levee for the protection of the said lands of said defendants.

XXXV. That said Sny Island Levee Drainage District has annually since its organization made large assessments upon nearly all said tracts of land which are rightfully subject to the lien of the assessments for the payment of complainants' bonds, for the purpose of raising money to pay the cost of the repair and maintenance of said levee, and that said defendants pretend that said assessments are a lien upon said lands paramount to complainants' lien, and said defendants intending to defeat the just lien of complainants by certain pretended proceedings in some court, have caused many of said tracts to be sold for the assessments made through said Sny Island Levee Drainage District and have caused deeds on said sale to be made.

XXXVI. That before the construction of said levee the entire body of lands which includes the tracts assessed for the construction of the said levee and each of the

tracts thereof, was so wet and swampy and subject to such frequent overflows by the Mississippi River, that they did not exceed in value an average of fifty cents per acre. That while the average assessments per acre greatly exceeded the then market value of said lands, it was expected and promised by the land owners and the commissioners that the construction of said levees as proposed, would drain said lands and protect them from overflow, render them healthy and productive, and so greatly enhance them in value as to make them ample and desirable security for said assessments.

XXXIX. That complainants' testator, relying upon said representations, was induced to purchase and pay for said bonds, in the belief that after said levee was completed said lands would be drained and protected from overflow and made healthful and profitable for cultivation and enhanced in value to an average of twenty-five dollars per acre, and that thereby the assessments on said lands would become an adequate security for the amount of said bonds.

XL. All the defendants who appeared, demurred to the Bill of Complaint on the following grounds:

(1) Want of equity in the bill.

(2) That the claims of the complainants have become stale, and by reason of the complainants' negligence in pressing and enforcing their rights, are not now enforceable against the defendants.

(3) That complainants and their testator have been guilty of laches and have so long remained idle, that the rights of many outside persons have intervened so that complainants are estopped to assert their rights against the defendants.

(4) That the allegations in the bill do not raise any implied promise on the part of the defendants, nor any equitable obligation to pay the bonds or any sum of money.

(5) That the facts alleged in the bill do not entitle complainants to any lien or charge upon defendants' lands.

(6) That the complainants' remedy is at law.

Upon the argument of the demurrers, Messrs. Hay, Greene & Humphrey assigned as additional grounds of demurrer *ore tenus:* that this court had no jurisdiction to collect the assessments in the mode prayed for in the bill, nor in any other way, and depending thereon, that there is *no lien on the lands* in favor of the complainants.

XLI. These grounds of demurrer raised all the questions of law which were afterwards raised at the final hearing except (1) the question of the sufficiency of the original construction of the levee and its conformity to the requirements of the contract and (2) the effect of sales of lands, on which drainage assessments had been levied, for general taxes pending the litigation.

XLII. The demurrers came on for hearing before the Circuit Court of the United States for the Southern District of Illinois in equity, Judge Gresham presiding and were all overruled.

XLIII. Thereupon the demurring defendants and other defendants answered, full and extensive proofs were taken and the cause submitted to United States District Judge William J. Allen on the 9th day of November, 1895. On the 10th day of February, 1897, he entered a decree dismissing the bill of complaint with costs. (Opinion Record, pp. 474-489.)

Decision of Circuit Court on the Merits and Decision of Circuit Court of Appeals.

XLIV. An appeal was perfected on the 5th day of April, 1897, the record on appeal was filed in the United States Circuit Court of Appeals for the Seventh Circuit on the 30th day of June, 1897, and the cause came on and was heard on the 7th and 8th of June, 1898, before Mr. Justice Harlan, Circuit Judge Woods and Circuit Judge Showalter. The latter took part in the hearing but died before participating in the decision of the case, which was announced on the sixth day of June, 1899, by Mr. Justice Harlan and Judge Woods.

XLV. Your petitioners further show that Judge Drummond in the orders of 1879 and 1880 sustained the right of your petitioners' testator to enforce in a court of equity the assessments or some of them here in question, notwithstanding the decision of the Supreme Court of Illinois that the law of 1871 was unconstitutional, and that Judge Gresham also sustained the right of complainants to file the bill in this cause and the theory thereof, by overruling the demurrers of the defendants after full argument thereon but now, after full proofs have been taken at great expense establishing the facts charged in the bill the District Judge and two of the Judges of the Circuit Court of Appeals—Judge Showalter not participating in the decision although he took part in the hearing—have decided in opposition to the decisions of Drummond and Gresham and dismissed the bill of complaint of your petitioners.

XLVI. Your petitioners respectfully represent that the decision of the Circuit Court of Appeals is erroneous and that there are several questions involved in this litigation of gravity and importance and of general interest upon which the decision of the Circuit Court of Appeals in

this case is in conflict with a decision of this Honorable Court and with numerous decisions of the Federal and State Courts.

(1) The Court of Appeals held that none of the defendants were estopped from setting up as a defense to the bill the unconstitutionality of the law, upon the faith of which the money to construct the levee was secured from complainants, although the record established beyond dispute the following facts:

That certain defendant land owners formed and subscribed to the stock of the Mississippi Levee Drainage Company "for the purpose of carrying into effect" the levee law of 1871 (Record, p. 59), "and which furnished the means necessary to do the preliminary work." That numerous public meetings were held in the leading towns of Pike County in and near the levee district, which were quite freely advertised by handbills, at which the law was read and its provisions explained and contributions were obtained from defendant land owners for the preliminary work under the act of 1871. Articles to like effect were published in Hannibal Courier. (Record, pp. 60-62.) Other defendant land owners petitioned the County Court of Pike County to commence proceedings under the act, one hundred and thirteen in first petition (Record, p. 447), and one hundred and twenty-three in the second petition (Record, pp. 26, 27, 442); that all resident land owners had personal, and all non-resident land owners constructive, service of notice of said petition; that none took any steps to restrain said proceedings, but all stood by and encouraged the work until it was completed; that Wheelock and the other commissioners "acting for such land owners" authorized the

publication of Pamphlet A (Record, p. 385), which contained opinions of eminent counsel that the law was constitutional and the proceedings under it valid, and the certificate of the commissioners (Record, p. 390): "*There is no opposition to the improvement, but on the contrary, it is unanimously demanded by the owners of the land,*" and also contained a like certificate of the Judge of the Pike County Court; (Record, p. 391) that interest assessments were paid by the land owners, and the interest on the first issue of bonds was paid to Palms for 1873 and 1874 by the commissioners (Record, pp. 385, 410), thereby inducing Palms to take the whole issue of 1875 in the sum of $148,500. (Record, p. 372.) The defendant Wheelock was a land owner and one of the Levee Commissioners. The record shows the following acts of estoppel as to him: "He knew Clark was undertaking to get the law through the legislature (Record, p. 167), signed the petition for the appointment of commissioners and the institution of proceedings under the act (Record, p. 446), accepted the office of commissioner (Record, p. 66), was active in the proceedings to acquire title to the site of levee by voluntary deeds, made a written report to the Court; executed the contract for the construction of the levee (Record, p. 67); paid the interest on the bonds for the years 1873 and 1874 (Record, pp. 385-410); authorized the publication of the pamphlet containing the certificate of the commissioners (Record, pp. 389-390), "that there was no opposition to the improvement, but on the contrary, it was unanimously demanded by the owners of the land," and containing opinions of eminent counsel that the proceedings were valid and the assessments legal (Record, pp. 387-9); delivered the bonds to the contractors in payment of their work; accepted the trust under the trust deed and

collected assessments thereunder to repair and maintain the levee (Record, p. 68); held possession of the levee as receiver under appointment of the Federal Court in the original bill filed by Mr. Palms in the Federal Court; without authority from that Court turned it over to the present Sny Island Levee Drainage District, which still holds possession of it and with it *protects his lands from overflow.*

Defendant Clark's conduct and acts of estoppel are, if possible, more binding. He was the head and front of the whole scheme from its very inception; procured the drawing up and passage of the law; called and addressed meetings of land owners to get action taken under the law; got up the Mississippi Levee Drainage Company; as he says, "officiated as the organizer generally and did all the talking" (Record, p. 60); went over the proposed route of the levee with commissioners and commissioners' engineer; obtained, with assistance of Mr. Chamberlain, another defendant land owner, the signatures to the petition to the Pike County Court; went with the commissioners' engineer and jury when they viewed the route and made their assessments; "made all the publications the law required;" posted the notices; was up and down the levee so often that his "horse got so that he knew the places almost;" in fact, did everything in his power to get the levee constructed by money and work advanced on the faith of the act. (Record, pp. 58, 65, 77, 93, 106, 114, 246.)

The record also shows that many other defendants who are specifically named participated in some or all of the above named ways in invoking action under the statute of 1871 and inducing contractors and others to invest their money in the enterprise upon the faith of the assessments to be made under the law.

Questions of Gravity and Importance—Conflict of Decisions with U. S. Supreme Court and Supreme Court of Illinois.

This ruling of the Circuit Court of Appeals is, we respectfully submit, in express conflict with the principle of estoppel enunciated in Daniels vs. Tierney, 102 U. S., 415, citing authorities, and quoting p. 421 with approval this language from Ferguson vs. Landrum, 5 Bush. (Ky.), 230: "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent or subsequently sanctioned by him or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute."

The decision of the Circuit Court of Appeals disregards and is opposed to the decision of the Supreme Court of Illinois in Blake vs. The People, 109 Ills., 504, and the limitation put by the court upon the effect of Updike vs. The People, 81 Ills., and People vs. Webster, unreported. In the Blake case, p. 521, speaking of the levee and law here in question the Supreme Court of Illinois say:

"It is not accurate to say, merely because a law is repugnant to some provision of the Constitution as in favor of particular rights, it is no law for any purpose. The respects wherein the act of April 24, 1871, was condemned as being unconstitutional were only as affecting those over whose lands the drains, levees, etc., were proposed to be constructed without the owners' consent, and those against whose property it was proposed to assess the costs of constructing such drains or levees without their consent. As to all other persons, and for all other purposes, the act was a valid law. As to those who were seeking to construct the drain, levee, etc., and who were promoters of the corporation, and to

those who otherwise relinquished all right to interpose these objections to the validity of the law—as, for instance, those who gave the right of way for the drains and levees, and who voluntarily paid their special assessments—the law was not void. Cooley's Const. Lim. (Est. ed.), 181; Baker vs. Braman, 6 Hill, 47; Embury vs. Connor 3 N. Y. (3 Comst.) 511. And precisely the same must be true as to whether the construction of the levee was in excess of the authority conferred by the statute. As to those who did not, in some proper way, give their consent thereto, and whose property was proposed to be taken or damaged thereby, or to be charged with the expense whereof, the act of building the levee was not 'under any law of this State;' but as to those who built the levee upon their own land, or who voluntarily consented that others might build it there, and to those who voluntarily built it, and who voluntarily paid their assessments for that purpose, it was 'under the law of this State.'"

It is also, we respectfully submit, in conflict with the following decisions in cases in which the facts are substantially similar but not so strong as in the case at bar:

Ferguson vs. Landrum, 1 Bush (Ky.), 548.
Ferguson vs. Landrum, 5 Bush (Ky.), 230.
State vs. Van Horn, 7th Ohio St., 327.
Kellogg, Treas., vs. Ely, 15 Ohio St., 64, a drainage tax case.
*People vs. Murray, 5 Hill, 468.
Motz vs. City of Detroit, 18 Mich., 495.
Jackson vs. City of Detroit, 20 Mich., 248.
*City of Burlington vs. Gilbert, 31 Iowa, 356.
Wiggin vs. Mayor of New York, 9 Paige, 16.
Re Application Edward Cooper, 93 N. Y., 507.

*Bidwell vs. City of Pittsburg, 85 Penn. St., 412.
*Dewhurst vs. City of Allegheny, 95 Penn. St., 437. an action at law.
Ricketts vs. Sprasker, 77 Ind., 371.
*Tabor vs. Ferguson, 109 Ind., 227.
*State vs. Mitchell, 31 Ohio St., 592.
*City of Columbus vs. Sohl, 44 Ohio St., 479.
*City of Columbus vs. Sly, 44 Ohio St., 444.
*Muncey vs. Joest, 74 Ind., 469, a drainage case.
*Nervius vs. Otter Creek, etc., Co., 36 Ind., 189, action at law to recover a drainage assessment.
*Flora vs. Cline, 89 Ind., 208.

These decisions are not confined to the rule that equity will not relieve *a complainant* whose conduct has estopped him to ask the relief prayed. Daniels vs. Tierney and the other cases marked with an asterisk are cases where the estoppel was enforced against defendants, in actions to recover the assessments.

(2) The opinion of the Circuit Court of Appeals states that "these authorities when carefully examined do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by this record. All who had any connection with the passage of the act of 1871, or who desired its passage, acted as we may assume in good faith and in the firm belief that its provisions were not inconsistent with the Constitution of the State. It cannot be said that any one was guilty of fraud. No assurances of an affirmative character were given by the land owners to those who constructed the work, or to those who, like Palms, purchased the bonds after they were executed and delivered to the contractors.* The

*This statement is not strictly accurate. Defendants Wheelock and the two other commissioners certified to Skelsey, Fuller and Pierce, the contractors, and to Pierce and Brower, financial agents, for use in selling the bonds, the printed pamphlet. (Record, pp. 385-393.) "There is no opposition to the improvement; but, on the contrary, it is unanimously demanded by the owners of the lands. (Record, pp. 389-390.)"

land owners, the contractors, and the purchasers of bonds all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. It is a case of an honest mistake as to the competency of the legislature to do what it attempted to do, no one being misled by the assurances and representations of others. The entire argument of learned counsel for the plaintiffs on this part of the case leaves out of view, or assumes to be of no consequence whatever, the fact, apparent on the face of the act of 1871, that what the land owners, proceeding under it, had in view was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things, it cannot be supposed that any land owner would have become connected with the scheme embodied in the act of 1871 unless the maintenance of the levee by competent legal authority was assured. It is, therefore, unjust to the land owners, to say nothing more, than they assented to the construction of the levee. If they are to be deemed to have assented to anything, it must be further said that they assented to a scheme under which a levee was to be constructed *and maintained*, under the authority of the law, from time to time, and so as to accomplish the results contemplated by the legislature. The system devised by the act of 1871 is to be looked at in its entirety. We cannot put out of view a vital part of it and hold the land owners who acted in good faith, and who gave no personal assurances or made any representations responsible for the results to others flowing from invalid legislation and the partial execution of the original plans. If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that

the act of 1871 was valid, with equal truth it may be said that the land owners never would have sought or desired such legislation except in the belief that the levee would be maintained by the same authority that constructed it."

First. As a matter of fact there was no legal obstacle to the imposition of assessments to repair and maintain this levee after the act of May 29, 1879, adopted to execute the constitutional amendment of 1878. The defendant land owners, many of whom had promoted the construction of the levee, availed themselves of the statute and their right to do so was sustained in Blake vs. People ubi supra.

When this act was passed the levee was in the possession of Defendant Wheelock and his fellow commissioners, not only as Sny Levee Drainage Commissioners, but also as receivers under the appointment of the U. S. Court in Palms' original suit. The land owners formed the new Sny Island Levee Drainage District and Wheelock and his colleagues surrendered possession of it to the new legally formed district, which has ever since kept and maintained and repaired it by means of assessments levied under the law of 1879.

But passing this, the opinion of the Circuit Court of Appeals on this point is opposed to the decisions above cited and in direct conflict with Bidwell vs. City of Pittsburgh, 85 Pa. St., 412, 418, where the Court say, pp. 417, 418: "The power (to take steps to improve a street) was called into action by the petitioners. They asked to have the avenue brought under the operation of the act. They voluntarily asked for the privilege of becoming subject to all its provisions. They asked for the passage of the ordinance directing the work—for the assessment of their lands according to the frontage rule, in order to pay the bonds to be given to raise money to make the improve-

ment. The authorities acceded to the request. They altered their previous position. They assumed the large additional indebtedness, relying upon the words and conduct of the petitioners. The latter declared they would submit themselves to all the charges and responsibilities imposed by that act. They wilfully caused the authorities to believe this as a matter of fact. So believing, the authorities acted upon it. They accepted the offer in the terms in which it was made. The petitioners directed the work. They received and enjoyed the benefits. To now permit them to deny the truth or the efficacy of the assurance given, and continued during the progress of the work, would work a fraud on the city which cannot be sanctioned."

"It is true every one is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled, not by expressive silence merely of the plaintiff in error, but by his decided and persistent action. It has been held that where a party has acted upon a particular construction of a contract which has been acquiesced in by the other, the latter is estopped from contesting it as the proper construction. Mercer Mining and Manufacturing Co. vs. McKee, 17 P. F. Smith, 170."

Questions of Gravity and Importance—Continued.

"The constitutional right against unjust taxation, which the plaintiff in error invokes, is given him for the protection of his private property. He may waive that protection and consent to such action in regard to it as would otherwise be invalid. Having consented, and the other party having acted thereon, and made expenditures and incurred expense predicated thereon, the consent cannot be withdrawn."

In answer to a similar claim—of mutual mistake—the Supreme Court of Ohio say in State vs. Van Horne, 7 Ohio State, 327, 332: "The one" (the taxpayer) "was certainly as much bound to know (the law) as the other" (the bondholders) "and if both were mistaken no principle of law or justice would demand that the taxpayers should retain the fruits of the mistake, and at the same time repudiate those very acts of their own which misled the bondholders and induced them to part with their money; in truth blowing hot to get the bondholders' money and blowing cold to rid themselves of the obligation to refund it."

Granting the statement in the opinion of the Circuit Court of Appeals that "contrary to the expectations of all interested in them those proceedings were adjudged to be without the sanction of law." It does not take out of the rule the case of those defendant land owners who promoted and carried out the scheme for their own benefit and still retain its advantages. They obtained the money from Mr. Palms to complete the levee by the second assessment under the same section of the act which authorized maintenance assessments. Sec. 39, Record, p. 403, *ubi supra*.

Therefore, it seems indisputable that if the principle of estoppel applies at all, it must apply to all the provisions

of the statute. If the rule prevents the promoting defendant land-owners from alleging the unconstitutionality of the statute as to assessments *for constructing the levee*, it must prevent such an allegation against the assessments for *maintaining* the levee.

The defendant land owners who were promoting the scheme did not ask the expenditure of money from contractors and others on the faith *of construction assessments which were not to be binding unless* the repair and maintenance assessments were held valid. They held out as the inducement the entire statute. They asked the money and work of others upon the faith *of all the provisions of the statute*, and by their conduct assured contractors and others that they would not attack the *validity of the law in any particular*. In the language of the opinion in Bidwell vs. City of Pittsburg, *ubi supra*, these contractors and others had no reason to believe that these land owners who were promoting the building of the levee "*would allege any invalidity* in the law which they were praying to have extended over them."

(3) The Circuit Court of Appeals, in the opinion, make no allusion to a very large number of defendant land-owners who have purchased the lands subject to these drainage assessments and agreed to pay them, but the decision holds the assessments void as to their lands.

This is in conflict with many decisions on this question.

Keeler vs. Ashford, 133 U. S., 610, 624.
Crawford vs. Edwards, 33 Mich., 354.
Dickinson vs. Worthington, 10 Fed. R., 860.
Cordova vs. Hood, 17 Wall., 1.
Lovejoy vs. Raymond, 58 Vermont, 509.

Questions of Gravity and Importance—Legal Effect of Alleged Inadequacy of Construction of Levee.

(4) The Circuit Court of Appeals, in its opinion, says: "There was evidence tending to show—indeed, we think the weight of evidence was—that the levee built under the Act of 1871 was not adequately constructed." We do not understand the decision is placed on this ground, but it is proper to call it to the attention of this Honorable Court.

In the contract between Wheelock, Jones and Dustin, commissioners (Record, pp. 366-369), it was provided, among other things, "that said parties of the first part, in consideration "of the premises of said levee commissioners hereinafter set forth, agreed to construct and finish the proposed levee of the commissioners in accordance with the specifications now on file in the County Court of Pike County, Illinois, and with the instructions, from time to time, of the chief engineer of said levee commissioners and to his entire satisfaction and approval." Said levee is to be located according to the above general description by the chief engineer of said levee commission. (Record, p. 366.)

After and in consideration of the work to be done by the parties of the first part, the said levee commissioners agreed to pay them as follows: "The work to be paid for in the bonds issued by said levee commissioners at a valuation of ninety per cent of their par value, payments to be made on or before the tenth day of each month, * * * and to be made on estimates furnished by the chief engineer of said levee commissioners, reserving, however, ten per cent of each monthly estimate from each monthly payment until the final and satisfactory completion of the work in this contract, when a final estimate will be made by the chief engineer, which shall be conclusive on the parties to this contract; and upon the making of such final

estimate, the balance appearing due to the said party of the first part shall be paid." * * * "It is further agreed, in case of any disagreement or difference of opinion between the parties hereto as to the true intent and meaning of the contract, the matter shall be referred to the chief engineer of said levee commissioners, and his opinion shall be binding on all the parties to this contract." (Record, pp. 366-367.)

An inspection of this entire contract is invited. It will show how carefully the contract was drawn to protect the commissioners and the persons whom they represented against any default or deficiency in the performance of the contractors' agreement. There are many authorities that under a contract like this there cannot be any appeal from or review of the decision of the chief engineer, except in case of clear proof of fraud.

Savercool vs. Farwell, 17 Mich., 308.
Railroad Co. vs. March, 114 U. S., 549.
Shipman vs. District of Columbia, 119 U. S., 148.
Chicago S. F. & C., R. Co. vs. Price, 138 U. S., 185.
Sheffield & B. Coal, I. & R. Co. vs. Gordon, 151 U. S., 285.

There are many authorities that in a contract like the one at bar the ninety per cent to be paid on the monthly estimates becomes absolutely and unqualifiedly due the contractor at the time named in the contract, regardless of the time of final completion of the contract.

Strauss vs. The Railroad Co., 7 W. Va., 368.
Baltimore & Ohio R. R. vs. Gallahaus, Admr., 14 Grattan, 563.
Hennessy vs. Farrell, 4 Cush., 267.

Questions of Gravity and Importance—Alleged Laches of Complainants.

Therefore, when the bonds signed and issued by the commissioners, were purchased by the public all questions as to the character or sufficiency of the construction of the levee had been conclusively and finally decided, and cannot now be set up as a defense to the assessments.

Moreover the bondholders do not claim under the contractors, but under the provisions of Section 35 of the statute.

Sec. 35. "The commissioners may borrow money, not exceeding in amount of assessments unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

(5) The opinion does not put the decision upon the ground of laches of complainants or their testator, but contains this language:

"He (Mr. Palms) was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000.00 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground

for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a court of equity ought to decline giving them any relief." * * * *

"But without discussing the adjudged cases upon the subject of laches, and passing many questions discussed by counsel, and which we deem it unnecessary to decide, we affirm the decree of the Circuit Court upon these grounds: 1. The act of 1871 was repugnant to the Constitution of Illinois of 1870. 2. The bonds issued under the act were void. 3. The lands intended to be benefited and protected by the levee constructed under the act of 1871 could not be specially assessed by any action taken in conformity with the provisions of that act. 4. Nothing was done or said by the owners of the lands, so intended to be benefited and protected, that estopped them to dispute the validity of the act of 1871, and of all that was done under it, or that created any equity in favor of the holders of bonds to have said lands sold to pay any special assessment or the bonds issued to contractors."

We beg leave to call attention, with the utmost deference to the learned Circuit Court of Appeals, to some inaccuracy in this statement and some erroneous deductions therefrom.

The opinion states that Mr. Palms "was given leave to file such a bill" (viz: a supplemental bill to bring the land owners before the court) "by an order entered in 1879." This is not accurate. The decree of 1879 (Record, pp. 437, 438) did so state, but referred it to a master to ascertain the amounts due to the complainants and other persons, and ordered that after "the coming in of the master's report of the amount or amounts found by him to be due the

complainants or other persons who may come into the cause as aforesaid, and the approval of the said report, * * * the said complainants have the liberty to exhibit and file their supplemental bill or bills against any or all the present or former owners of the said lands alleged in said bill to be benefited by the said levee." The master's report was not filed until July 7th, 1880, and the definite and authoritative leave to Mr. Palms and others to file a supplemental bill for the recovery of the amounts found due them by the master was not granted until July 7th, 1880 (Record, pp. 439 to 441), and this order of leave was limited to the amounts found due by the master, which at that time included only the accrued interest.

The opinion also states: "But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed."

Whereas the record shows that the first assessments did not fall due until October, 1883, and that none of the Palms bonds matured until July, 1883, when $28,000 fell due, and at his death, November 24th, 1886, only $58,000 had matured, $13,000 of this amount falling due within a few months before his death (Record, pp. 21, 22, 273).

At the date of the decree of July 1880, nothing but interest had accrued. The principal of the first assessment was not to become due until July 1st, 1883, and none of the bonds held by complainant had matured.

In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners were spending money in repairing, and it would have been unreason-

able for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due.

His executors were appointed in 1887 and filed this bill in April, 1889. When the great amount of detailed examination of the titles to the lands in Exhibit "A" and the time necessary to have prepared needed abstracts is considered, they proceeded with unusual speed. Their bill was filed a little more than two years after their appointment; before their entire claim had matured; less than six years after the earliest maturing bonds of the issue of 1872 fell due, and three years before any of the bonds of the issue of 1875 had matured. The earliest maturing bonds of this series did not become due until 1892. The Illinois statute of limitation, cited in the opinion, had not run against any one of Mr. Palms' bonds when the bill was filed.

Again, during the period between the decree of 1880 and the filing of the bill, no such changes in the title of the lands have occurred that defendants will suffer great injury if assessments are now enforced.

If any persons have purchased without notice of complainants' rights to enforce the assessments, then their lands go free. If they purchased with notice they did so at their peril. The acts of estoppel are almost all proven by matters of record.

(6) It is said in the opinion, after quoting the statute of limitations of Illinois for the bringing of actions for the recovery of real estate, "In this case most of the defendants made proof of adverse possession."

Where the parties claim from a common source of title there can be no adverse possession by the owner of the

fee against a lien holder who has not foreclosed his lien and acquired a right to possession. No adverse possession can begin to run against one who has no right to recover possession.

If the opinion refers to defendants who hold tax titles purchased since the assessments, under Illinois and other state decisions no defendant land owner who was in possession or claimed title at the time his lands were assessed for the levee can assert subsequent tax titles bought by him against the lien of the assessments.

> Dubois vs. Campau, 24 Mich., 360.
> Bassett vs. Welch, 22 Wis., 176.
> Sappo vs. Gilbert, 26 Kans., 139.
> McAlpine vs. Zetner, 119 Illinois, 273.
> and Illinois decisions cited infra.

And complainants cannot recover any lien against any of these lands *which are not now held by a title derived from* the original land owner against whom the assessments were made, so that the question of adverse possession is not in the case.

The bill is filed only to enforce the lien of the levee assessments. The validity and amounts thereof are the only questions in the case. The validity and superiority of independent outstanding tax titles in third persons is not involved in this suit.

McAlpine vs. Zitzer, 119 Ill., 273 (1887), was a bill in equity to foreclose a mortgage executed by John Von Gunten, to the appellants. Charles Von Gunten was made a party to the bill, which sought to set aside a tax deed. Charles Von Gunten, the son of John Von Gunten, purchased for an insignificant sum the tax titles to the premises and secured a tax deed to them, his father continuing to exercise proprietorship over the premises. Dur-

ing the suit the son quit-claimed to Julia Zitzer, his sister. The Circuit Court rendered a decree of foreclosure; on appeal to the Appellate Court the bill was dismissed as to the sister, but affirmed in all other respects, then this appeal was taken, when the judgment of the Appellate Court was reversed and that of the Circuit Court affirmed. Held, that as there was collusion between father and son, the tax sale can have no other effect "than if the mortgagor had, himself, been the purchaser at the tax sale, and we hold that the tax title is subject to the mortgage. Where there is no collusion, "mere legal titles are for trial and determination in courts of law," and independent legal titles which are paramount should not be drawn in controversy."

Citing Gage vs. Perry, 93 Ill., 176
Bozarth vs. Landers, 113 Ill., 181.

XLVII. Wherefore your petitioners pray that this Honorable Court will be pleased to grant a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to bring up this case to this Honorable Court for such proceedings as shall seem just.

Henry M. Duffield
Counsel for Petitioners

MICHAEL W. O'BRIEN,
FRANCIS F. PALMS,
CLOTHILDE PALMS BOOK,
Petitioners.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MICHIGAN,
COUNTY OF WAYNE, } ss.

Michael W. O'Brien being duly sworn on his oath says that he is one of the petitioners in the foregoing petition and has read the same, and that the same is true to the deponent's knowledge, information and belief and deponent's knowledge is derived from the fact that he has acted for such petitioners in all matters connected with this litigation.

M. W. O'BRIEN.

Subscribed and sworn to before me this 27th day of March, A. D. 1900.

DIVIE B. DUFFIELD,
Notary Public, Wayne County, Michigan.

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

ALFRED RUSSEL.
DON M. DICKINSON.

APPENDIX A.

SCHEDULE OF LANDS OF TYPICAL DEFENDANTS.

NOTE.—Exhibit "A" has two series of page numbers, i. e., the first from page 1 to 133. *This is the second assessment.*

The second series begins with p. 1 following p. 133 and continues to the end of the volume, but is the *first assessment.*

The starred figures denote the pages of the *second series*, but *first assessment.*

The figures without stars denote the *first series*, but *second assessment.*

DEFENDANTS WHO WERE PETITIONERS FOR FIRST ASSESSMENT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."		Page of Ex. "X."	Referred to in Proofs.
M. M. Aldrich.....	S. W.....	6	5	7	$309 06	$310 94	$620 00	*41	43	2	Admits the fact. Answer of J. Wheelock et al., pp. 55-40.
	W. ½ N. E.....	7	5	7	68 45	97 09	165 54	*42	44		
Melville D. Massie.....	E. ½ S. W.....	7	5	6	436 00	130 40	566 40	*54	56	35	Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	S. ½ S. E. S. W.....	17	5	6	43 87	13 15	57 02	*55	57		
	S. W. S. W.....	17	5	6	162 19	48 54	210 73	*55	57		
	10 acres S. side N. E. N. E.....	19	5	6	218 00	16 30	234 30	*56	58		In Compt's testimony, Record, p. 96.
	W. ½ N. E.....	19	5	6	436 00	130 40	566 40	*56	58		
	N. W. N. W.....	20	5	6	88 00	26 40	114 40	*57	59		
	S. W. N. W.....	20	5	6	218 00	65 20	283 20	*57	59		
	N. W. S. E. except 10 acres on N. side.....	26	5	7	194 34	53 46	247 80	*50	52		
	N. pt. S. W. S. E.....	26	5	7	60 82	13 52	74 34	*50	52		
Sammel M. Spencer....	S. ½ S. W. E. of Sny .. 43 16-100 acres S. E. cor. N. W. ¼.....	18	4	7	311 95	90 30	402 25	*26	28	50	Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	N. W. ¼ S. of Wabash Ry.....	19	4	7	1,153 38	344 97	1,498 35	*27	28		
		19	4	7	1,153 38	344 97	1,498 35	*27	28		Compt's testimony, Record, p. 74.

DEFENDANTS WHO WERE PETITIONERS FOR SECOND ASSESSMENT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Norman Brown	W. ½ N. W.	10	7	5	436 00	130 40	566 40	*83	87	6 Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	S. E. N. W.	10	7	5	218 00	65 20	283 20	*84	87	
	S. W.	10	7	5	872 00	260 80	1,132 80	*84	87	
Charles N. Clark	120 acres S. end S. E.	4	5	7	811 13	242 53	1,053 66	*40	42	7 Admits the fact. Answer of J. G. Wheelock et al., pp. 55-40.
	N. E.	9	5	7	679 91	230 26	910 17	*43	44	
	S. E.	9	5	7	781 96	234 91	1,016 87	*43	45	
	Und. ½ S. W.	2	7	5	872 00	260 80	1,132 80	*80	83	Compt's testimony, Record, p. 60.
	Und. ½ S. E.	2	7	5	872 00	260 80	1,132 80	*80	83	
	Und. ½ N. E.	11	7	5	872 00	260 80	1,132 80	*84	83	
	Und. ½ N. W.	11	7	5	872 00	260 80	1,132 80	*84	83	

DEFENDANTS WHO WERE SIGNERS OF TRUST DEED.

Richard H. Baker	S. ½ S. W. S. E.	6	4	7	90	27	1 17	*21	22	3 Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-41.
	N. E. S. W.	12	4	8	218 00	65 20	283 20	*13	13	
	W. ½ E. ½ N. W.	7	4	7	325 03	97 21	422 24	*21	23	
	N. E. N. W. S. W.	12	4	8	54 50	16 30	70 80	*13	13	Copy of Trust Deed referred to p. 499, not printed.
	E. 10 acres S. ½ W. ½ N. W.	7	4	7	338 66	99 64	438 30	*22	23	
	S. E. N. W. S. W.	12	4	8	54 50	16 30	70 80	*13	13	
	Lot 1 E. side S. W.	7	4	7	381 50	114 10	495 60	*22	23	
	W. ½ N. W. S. W.	12	4	8	109 00	32 60	241 60	*13	13	
	Lot 2 mid. sub. S. W.	7	4	7	436 00	130 40	566 40	*22	23	
	S. W. S. W.	12	4	8	145 35	43 47	188 82	*13	13	
William H. Gray	S. W.	24	6	6	701 36	209 76	911 12	*70	72	19 Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-41.
	N. W.	25	6	6	854 72	255 63	1,110 35	*70	72	
	N. W.	19	6	5	976 90	292 16	1,269 06	*73	76	Testimony, Record, p. 277.
William D. Shinn	N. W. ¼	30	6	5	872 00	260 80	1,132 80	*75	78	55 Admits the fact. Answer of J. G. Wheelock et al., Record pp. 55-41.
	N. E. ¼	25	6	6	872 00	260 80	1,132 80	*70	72	
	S. W. ¼	36	6	6	872 00	260 80	1,132 80	*71	74	

DEFENDANTS WHO PETITIONED FOR ORGANIZATION OF SNY ISLAND LEVEE DRAINAGE DISTRICT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Isaac Barton	S. E.	29	6	5	533 17	159 45	692 62	*75	78	5 Admits the fact. Answer of J. G. Wheelock et al., pp. 55-41.
	E. ½ N. E.	32	6	5	654 00	195 00	849 00	*76	79	
	Und. ½ S. E.	3	6	6	872 00	260 80	1,132 80	*65	67	
	N. E. N. W.	10	7	5	217 99	65 19	283 18	*83	86	
	W. ½ N. W. S. W.	3	7	5	872 00	260 80	1,132 80	*81	84	
	N. ½ S. E.	10	7	5	872 00	260 80	1,132 80	*84	87	
	N. E. ¼	26	6	6	857 72	256 54	1,114 26	*70	73	
Ozias M. Hatch	N. E.	25	4	8	872 00	260 80	1,132 80	*19	19	22 Admits the fact. Answer of J. G. Wheelock et al., pp. 55-41.
	N. W.	25	4	8	872 00	260 80	1,132 80	*19	19	
	N. E.	4	6	6	872 00	260 80	1,132 80	*65	68	

DEFENDANTS WHO WERE MADE PARTIES TO SNY ISLAND LEVEE DRAINAGE DISTRICT.

J. W. Boyd	S. W. N. E.	6	5	6	221 37	66 20	287 57	*52	54	4 Record, p. 34.
	S. E. N. E.	6	5	6	100 94	30 20	131 14	*52	54	Record, p. 101.
	E. ½ N. pt. W. ½ S. W.	6	5	6	154 23	46 12	200 35	*52	54	
	N. pt. E. ½ S. W.	6	5	6	209 73	62 72	272 45	*52	54	
	W. ½ S. E.	6	5	6	436 00	130 46	566 40	*53	55	
George W. Wells	S. pt. E. ½ N. W.	18	7	4	42 82	12 81	55 63	*93	96	66 Record, p. 36.
	E. ½ N. E. S. W.	18	7	4	16 34	4 89	21 23	*94	97	Record, p. 101.
John H. Webster	S. pt. S. E.	18	7	4	87 72	34 25	121 97	*94	97	67 Record, p. 36.
	N. E. pt. N. E.	19	7	4	545 33	163 33	708 66	*94	97	Record, p. 101.

DEFENDANTS WHO ACQUIRED TITLE FROM PETITIONERS FOR FIRST AND SECOND ASSESSMENTS AND ORGANIZATION OF SNY ISLAND LEVEE DRAINAGE DISTRICT.

DEFENDANT'S NAME.	NAME OF PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Abner V. Wills	James M. Spencer	28 67-100 acres N. of Ry. N. E. ¼	23	4	8	950 64	284 32	1,234 96	*18	18	64	Record, p. 28.
		8 52-100 acres N. side N. W. ¼	23	4	8	839 02	250 93	1,089 95	*18	18		Record, p. 124.
Joel K. Scarborough	James M. Spencer	S. ½ S. W.	24	4	8	872 00	260 80	1,132 80	*19	19	58	Record, p. 28.
		N. E. ¼	25	4	8	872 00	260 80	1,132 80	*19	19		Record, p. 254.
		N. E. ¼	26	4	8	872 00	260 80	1,132 80	*19	19		
		N. W. ¼	26	4	8	860 01	253 53	1,113 54	*19	20		
		S. W. ¼	26	4	8	267 97	80 15	348 12	*19	20		
		S. E. ¼	26	4	8	885 62	264 87	1,150 49	*19	20		
Jacob H. Dickason	N. S. Rouse	N. W. N. E.	27	4	8	187 53	39 03	226 56	*19	20	11	Record, p. 27. Record, p. 146.

DEFENDANTS WHO HAVE ACQUIRED TITLE SINCE DATE OF PETITION FOR SNY ISLAND LEVEE DRAINAGE DISTRICT, JULY 26, 1880.

Joel L. Doud		S. W. N. E.	26	4	7	45 46	10 63	56 09	*30	32	12	Record, p. 37.
		N. W. S. E.	26	4	7	52 78	15 92	68 70	*31	32		Record, p. 313.
		N. E. S. E.	32	4	7	218 00	65 20	283 20	*35	36		
William P. Pryor		N. ½ N. W.	12	6	6	70 67	21 17	91 84	*67	70	44	Record, p. 38.
		S. ½ N. W.	12	6	6	174 90	52 33	227 23	*67	70		Record, p. 319.
Charles Robb		S. E. S. W.	26	5	6	3 49	1 04	4 53	*59	61	46	Record, p. 38.
		N. ½ N. E. N. W.	35	5	6	54 28	16 13	70 41	*62	64		Record, p. 318.
		N. ½ N. W. N. W.	35	5	6	72 08	21 55	93 63	*63	65		
		S. ½ N. W. N. W.	35	5	6	101 69	30 41	132 10	*63	65		

DEFENDANTS WHO ACQUIRED TITLE FROM SIGNERS OF TRUST DEEDS.

DEFENDANT'S NAME.	SIGNERS OF TRUST DEEDS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."		Page of Ex. "X."	Referred to in Proofs.
Daniel C. Bates	R. M. Atkinson	20 acres W. side E. ½	13	5	7	1,744 00	521 60	2,265 60	*44	46	4	Record, p. 287.
Wm. P. Lovett	R. M. Atkinson	76 acres S., pt. N. W.	13	7	5	782 95	234 18	1,017 13	*85	88	31	Record, p. 196.
		S. W. ¼	13	7	5	872 00	260 80	1,132 80	*85	88		

DEFENDANTS WHO HAVE TAKEN TITLE BY DEEDS RECOGNIZING THE LEVY OF THE ASSESSMENTS.

C. M. Alger		S. E. Und. ½	8	4	8	872 00	260 80	1,132 80	*11	11	1	Record, p. 40.
		W. ½ S. W.	9	4	8	872 00	260 80	1,132 80	*11	12		Transcript, p. 580.
		Lots 12 and 13, W. ½ N. W.	16	4	8	436 00	130 40	566 40	*15	16		
		E. ½ N. E.	17	4	8	401 39	120 04	521 43	*17	17		
		11 99-100 acres N. W. Cor. N. E.	17	4	8	218 00	65 20	283 20	*17	17		
Louis Green		S. W.	32	4	7	872 00	260 80	1,132 80	*34	36	19	Record, p. 40. Transcript, p. 580.
Christopher D. Greene		W. ½ S. W.	28	5	6	436 00	130 40	566 40	*60	62	20	Record, p. 40. Transcript, p. 580.

DEFENDANTS WHO ARE HEIRS AT LAW OF PERSONS ESTOPPED.

DEFENDANT'S NAME.	ANCESTOR'S NAME.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
H. B. Atkinson	R. M. Atkinson	N. E. Und. ½	14	5	7	872 00	260 80	1,132 80	*44 46	1	Record, p. 260.
		Frac. S. W. Und. ½	22	5	7	231 57	49 45	281 02	*47 49		
		S. E. Und. ½	22	5	7	752 07	267 17	1,019 24	*47 49		
		N. E. Und. ½	19	6	5	608 76	182 06	790 82	*73 76		
		S. W. S. W. Und. ½	19	6	5	154 99	46 35	201 34	*73 76		
		S. E. Und. ½	19	6	5	804 42	240 60	1,045 02	*73 76		
		N. E. Und. ½	7	6	6	840 22	240 53	1,080 75	*66 68		
		N. W. N. E.	11	6	6	218 00	65 20	283 20	*67 69		
		S. ½ N. E.	11	6	6	342 91	102 55	445 46	*67 69		
		S. W. Und. ½	30	7	4	438 35	131 50	569 85	*101 101		
Harry Higbee		S. ½ S. W.	5	5	6	5 70	1 70	7 40	*52 54	24	Record, p. 270.
		N. ½ N. W.	8	5	6	147 22	44 35	191 57	*54 56		
		N. E.	29	5	6	872 00	260 80	1,132 80	*60 62		
		S. W.	29	5	6	872 00	260 80	1,132 80	*60 62		
		S. W.	33	5	6	872 00	260 80	1,132 80	*62 64		
		S. E.	31	5	6	744 08	222 54	966 62	*61 63		
		N. E.	32	5	6	872 00	260 80	1,132 80	*61 63		
		Section	31	7	4	1,646 59	556 67	2,203 26	*101 101		

No. Draft 38

Office Supreme Court U. S.

Brf. of Duffield & Co.

JAMES I

SUPREME COURT OF THE UNIT

Filed Oct. 15, 1900

MICHAEL W. O'BRIEN et al.,
Executors,
Complainants and Appellants,

vs.

JOHN G. WHEELOCK, et al.,
Defendants.

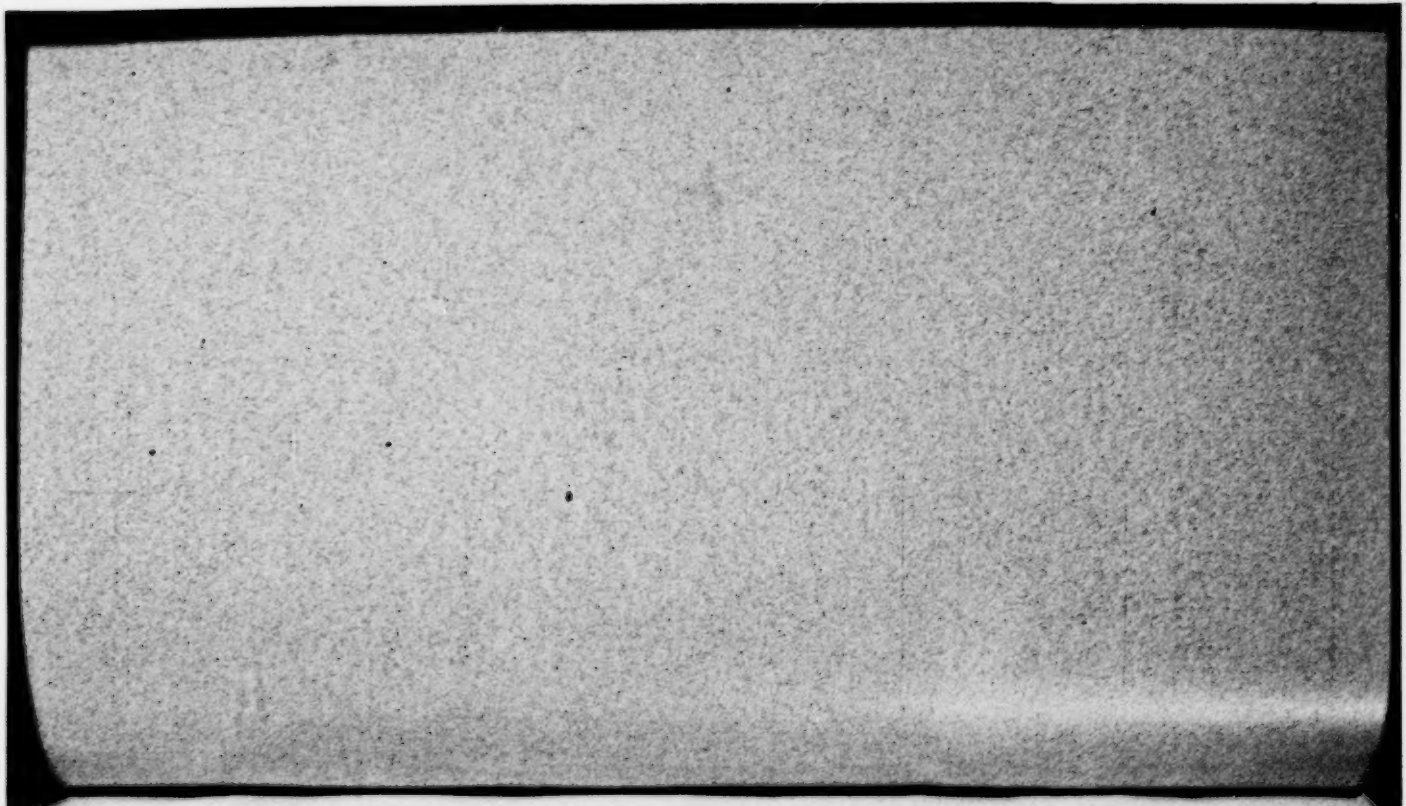
No. 241. October term, 1900.
Certiorari to the United States Circuit Court of Appeals for the 7th Circuit.

MOTION AND BRIEF IN SUPPORT THEREOF, FOR LEAVE TO FILE PRINTED TRANSCRIPTS OF THE RECORD IN THIS CAUSE IN THE UNITED STATES CIRCUIT COURT OF APPEALS, IN LIEU OF REPRINTING THE ENTIRE RECORD IN THIS COURT.

HENRY M. DUFFIELD,
Counsel for Complainants and Appellants.

BENJAMIN HARRISON,
Counsel for Appellees.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1900.



SUPREME COURT OF THE UNITED STATES.

MICHAEL W. O'BRIEN, et al.,
Executors,
Complainants and Appellants,
vs.
JOHN G. WHEELOCK, et al.,
Defendants.

No. 241. October term, 1900.
Certiorari to the United States Circuit Court of Appeals for the 7th Circuit.

MOTION AND BRIEF IN SUPPORT THEREOF, FOR LEAVE TO FILE PRINTED TRANSCRIPTS OF THE RECORD IN THIS CAUSE IN THE UNITED STATES CIRCUIT COURT OF APPEALS, IN LIEU OF REPRINTING THE ENTIRE RECORD IN THIS COURT.

And now come said complainants and appellants, by Henry M. Duffield, their counsel, and under the stipulation of counsel in this cause move the Court for an order permitting the filing with the clerk of this Court of five printed copies of the record in the Circuit Court of Appeals in addition to the eleven copies now on file, in lieu of reprinting the entire record in this Court, for the following reasons:

Because the printing thereof in this Court under the peculiar circumstances of this case is unnecessary and improvident.

This motion is based upon the record in this cause and the stipulation of counsel, and the letter of Mr. Benjamin Harrison, of counsel for defendants-appellees, hereto annexed.

HENRY M. DUFFIELD,
Counsel for Complainants and appellants.

SUPREME COURT OF THE UNITED STATES.

MICHAEL W. O'BRIEN, et al.,
Executors, Etc.,
Appellants,
vs.
JOHN G. WHEELOCK, et al.,
Appellees.

No. 241. October Term,
A. D. 1900.

In this cause it is stipulated between the parties hereto, by their respective counsel, that they respectively consent that the cause may be submitted upon filing with the clerk of this Court five printed copies of the record in the Circuit Court of Appeals in addition to the eleven copies now on file. Counsel for appellees further state that they are now each supplied with a copy of the transcript of the record furnished them by the clerk of the Circuit Court of Appeals, and they each consent that said copies will be accepted by them in lieu of a copy to be furnished by the clerk of this Court.

Dated this 15th day of August, A. D. 1900.

BENJ. HARRISON,
THOS. WORTHINGTON,
H. G. CRAWFORD,
HARRY HIGBEE,
Counsel for Appellees.

HENRY M. DUFFIELD,
Counsel for Appellants.

Berkeley Lodge, Old Forge P. O., N. Y.,

Aug. 16, 1900.

Thomas Worthington, Esq.,
Jacksonville, Ill.

My Dear Sir:

I have received your letter of the 14th with the inclosures. I have signed the stipulation and return it with this. It does seem, counsel agreeing, that the Court ought to be willing to make this order, as it will result in no possible inconvenience to the judges, or to the counsel, and will save to the losing party a very large sum of money. You may send this letter or a copy of it to General Duffield, if he cares to use it in his application to the Court.

Very truly yours,

BENJ. HARRISON.

BRIEF IN SUPPORT OF MOTION.

Eleven complete printed transcripts of the record in the United States Circuit Court of Appeals, which conform in size and typography with the requirements of the rules of this honorable court for records printed herein were filed with the application to this court for a writ of certiorari.

Each of the counsel for the defendants has a similar printed copy of said transcript of record, and each of them, together with the counsel for appellants, has stipulated in writing for the granting of this motion.

The clerk of the court has sent to counsel for the appellants a statement under Rule 10, of the amount of money necessary for printing the record and the clerk's costs in this case at the sum of one thousand and seventy dollars ($1,070.00).

The printed record called for under this statement would be an exact and complete copy of the printed transcript of record from the U. S. Circuit Court of Appeals and would contain nothing in addition except the writ of certiorari and the return thereto which, as permitted under the practice of this court, is in this case a stipulation of counsel that the transcript of record from the Circuit Court of Appeals filed with the petition for certiorari may be treated as return to said writ. With the additional five copies of the record there will be on file in this Honorable Court sixteen copies for the exclusive use of the Court, counsel for all parties having stipulated that the copy of said transcript which they now have will be accepted by them in lieu of a copy to be furnished by the clerk of this court.

As counsel understand the practice of this court, these sixteen copies will be all that will be needed for the use of the court in this case, inasmuch as the stipulation of counsel waives their right to call upon the clerk for an additional copy.

The printing of the writ of certiorari and the stipulation of counsel which constitutes a return thereto, if deemed necessary, would involve very little expense and could be neatly and conveniently attached to the transcript of record in the United States Circuit Court of Appeals.

As stated in the letter of General Harrison, the granting of the order applied for "will result in no possible inconvenience to the judges or to the counsel and will save to the losing party a very large sum of money."

HENRY M. DUFFIELD,
Of Counsel for Complainants and Appellants.

FILED
APR 4 190
JAMES H. McKENNEY,
Cl

Brief of Duffield for Appts.

Supreme Court of the United States

OCTOBER TERM, 1900.

Filed April 4, 1901.

MICHAEL W. O'BRIEN, et al., Executors,
Complainants and Appellants,
vs.
JOHN G. WHEELOCK, et al.,
Defendants.

No. 241.

Certiorari to the U. S. Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF HENRY M. DUFFIELD,

Counsel for Complainants.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

SUPREME COURT OF THE UNITED STATES.

MICHAEL W. O'BRIEN, et al., Executors,
Comp'ts and Appellants,
vs.
JOHN G. WHEELOCK, et al.,
Defendants.

October Term, 1900.
No. 241.
Certiorari to the U. S. Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF HENRY M. DUFFIELD, COUNSEL FOR COMPLAINANTS AND APPELLANTS.

STATEMENT OF CASE.

Complainants are the executors of the last will of Francis Palms, deceased, of the City of Detroit, and are citizens of the State of Michigan and the defendants, who number about one thousand, are respectively citizens of the States of Illinois, Missouri and other states of the United States than the State of Michigan.

By leave of the Circuit Court of the United States for the Southern District of Illinois, in Equity, they filed a bill in the nature of a bill of revivor and supplement under which the proceedings therein and in the United States Circuit Court of Appeals for the Seventh Circuit hereinafter stated were had.

Character of Complainants' Bill.

The case grows out of the construction of a levee across the Sny Cartee Slough and along the banks of the Mississippi river, in the State of Illinois, from a point in the Township of Fall Creek, Adams county, through Pike county, terminating in Hamburg township in Calhoun county, a distance of about fifty-two miles, and with a height up to the high water mark of the Mississippi river of 1851. The levee has, during and since its construction, been at all times in the possession and custody of the defendants and their ancestors and assigns through commissioners of their own choosing. It has remained unbroken since 1888, and has grown as solid and secure as a natural river bank. Under the protection of this levee more than one hundred thousand acres of land which, before the levee was built were not worth on an average fifty cents an acre, have become worth ten to twenty-five dollars and upwards, and yield most bounteous harvests, one year's crops of which would more than pay the entire cost of the levee.

Complainants' bill seeks to enforce severally against defendants' lands certain special assessments levied thereon for the cost of constructing said levee under the provisions of an act of the Legislature of the State of Illinois, hereinafter stated.

The theory and scope of the bill is similar to those sustained by this Court in Fitch vs. Creighton, 24 How., 159, and Hagar vs. Reclamation District, 111 U. S., 701, referred to hereinafter.

The bill implies the possibility, and the evidence shows, in case the Court should declare the 1871 drainage law of Illinois hereinafter referred to unconstitutional, that some of the assessments may not be collectible because the land owners in those cases have not by their conduct or acts estopped themselves to deny the invalidity of the statute. On this account the original bill filed by

Character of Complainants' Bill—Lists of Typical Defendants.

Mr. Palms listed separately in the bound book, Exhibit "A," each description of land assessed, the name of the owner, and the amount of the assessment.

In the present bill complainants in Exhibit "X" list the same descriptions of land, the same assessments thereon, and the names of the owners at the date of the assessment as in Exhibit "A," with the addition of the names of the owners at the time of filing this bill. The changes in title are proven by admissions of defendants and by carefully prepared abstracts of title (Record, p. 377), introduced in evidence under a stipulation that they may be received with the same force and effect as the deeds referred to in them (Record, p. 113).

While the proofs are sufficiently full and explicit, to point out and authorize a decree in detail against each of the particular descriptions of lands of the several defendants, whom the Court may find estopped to attack the validity of the assessment, it would involve a detailed examination of the testimony, which is very voluminous. Believing this to be the appropriate function of a master under an order of reference declaring the rule of liability, counsel did not ask it of the Court below, but submitted short lists of certain typical defendants, whom they claimed to be estopped, with the several descriptions of their lands and the amounts of the respective assessments thereon and a brief statement of the act of estoppel relied upon. (Exhibit A to this brief gives a copy of such lists.)

The assessments which are sought to be enforced, and from the proceeds whereof complainants ask the payment of the bonds held by them, were levied under the provisions of an act of the General Assembly of the State of Illinois, approved April 24, 1871, entitled, "An act to provide for

the construction and protection of drains, levees and other works.

The act is printed in full in the record, pp. 394 to 404.

Its provisions are stated in the opinion of the Circuit Court of Appeals, Record, pp. 511-517, and a copy is hereto annexed, marked Exhibit "B."

It is sufficient here to state that the act provided a mode by which drains, ditches, levees and other works which were necessary for sanitary or agricultural purposes might be, constructed upon petition of land owners and occupants, by means of the formation of drainage and levee districts and other proceedings in the country courts of Illinois and paid for out of the proceeds of assessments upon the several descriptions of lands benefited.

The act is carefully framed. It requires damages to be *paid* before taking lands for the work; gives resisting land owners, a hearing before court and jury on all material questions, and affords every safeguard against injustice.

Section 27 of the act provides that when the Court shall confirm the assessments of benefits by the jury it may order the whole amount to be paid immediately or to be paid in installments, "and said assessments shall be a lien on the lands assessed until paid."

Section 35. Empowers the commissioners to borrow money for the construction of the work and give therefor notes or bonds, drawing interest not exceeding ten per cent, "which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon

the assessments for the repayment of the principal and interest thereon."

Section 39 provides: "Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners—or any owner or occupant of lands affected by the work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter or enlarge, cleanse, protect or maintain any drain, ditch, levee or other work, constructed by virtue of this chapter."

Under Section 35, above quoted, "bonds"* were issued by the commissioners of the Sny Levee Drainage District in 1872 and 1875—$499,500 under the assessment of 1872, and $148,500 of the issue under the second assessment of 1875. (Record, p. 81.)

Mr. Palms, relying on the good conscience and sense of justice of the land owners who would be benefited by said levee, and the statute which they held out to him through the levee commissioners, purchased $202,500.00 of the bonds issued in 1872 (Record, p. 372).

Interest was paid to Mr. Palms on these bonds for the years 1873 and 1874 (Record, p. 372).

Relying upon the above facts and the fact that the land holders generally had paid their interest assessments for 1872, 1873 and 1874,

Testimony of Defendants; Shewe, Rec., p. 301; Abram, Rec., p. 297; Roberts, Rec., p. 285; Elliott, Rec., p. 291.

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*These are not bonds in a strict sense, but are in legal effect similar to the instruments in New Orleans vs. Warner, 175 U. S., 120.

Description of Lands Protected by Levee.

Mr. Palms purchased the entire $148,500.00 of bonds issued in 1875—under a subsequent assessment, to supply a deficiency in the issue of 1872. It is proven beyond dispute that the location and construction of the levee was paid for by the proceeds of these and other bonds issued by the commissioners. (Record, p. 81.)

The several tracts of land described in Exhibit "A" constituted a body of land of an average width of from three to five miles, extending fifty-two miles from the mouth of Fall Creek, in Adams County, to Hamburgh Bay, along the east bank of the Mississippi, and between it and the bluffs or high water mark of the river, containing one hundred and ten thousand acres. They included the greater part of several congressional townships, and if reclaimed and protected from periodical overflows of the Mississippi River, would be fertile and healthy.

The map of the improvement attached hereto, marked Exhibit "D," is a copy of the one made under the charge of the chief engineer of the commissioners, found in the record between pages 384 and 385, showing the course of the levee and the surrounding lands.

From their proximity to the river and to the City of Quincy, a few miles north, and the cities of Hannibal, Louisiana and Clarksville, and the valuable cultivated lands in the neighboring region of Illinois and Missouri, they had attracted in an unusual degree the attention of persons seeking homes and others seeking speculative investments. While these bottom lands were sparsely populated, many persons residing on the high lands in the counties of Adams, Pike and Calhoun, in Illinois, and in the cities of Hannibal, Louisiana and Clarksville, in Missouri, had bought large bodies of said lands, expecting they would be reclaimed and protected by levees and be made productive and greatly increased in value.

Effect of the Building of the Levee Upon the Lands.

Before the levee was built the bulk of the bottom lands within its lines was in a wild and unimproved condition.

Defendant Clark's testimony, Rec., p. 109.

After its completion in 1875 they were at once cultivated extensively and most successfully. Crops in 1876 had increased ten times as much as in 1872.

Defendant Clark's testimony, Rec., p. 119.

In 1876 there were more than fifty thousand acres in wheat worth ten dollars or more an acre. Defendant Fesler in 1876 had two hundred acres in wheat which would go thirty bushels to the acre.

Testimony of Defendant Fesler, Rec., p. 169.

The crop of 1880 was one thousand acres of wheat worth ten to twelve dollars an acre and forty thousand acres of corn worth ten dollars an acre. In 1881 the corn crop was worth seven hundred thousand dollars and the wheat two hundred and fifty thousand dollars.

Testimony of Defendant Gay, Rec., pp. 157, 158.

Defendant Massie (Rec., p. 205) estimates crop of 1876, ten thousand acres in wheat at eighteen bushels to the acre at 70c. a bushel, $126,000; corn, eight thousand acres at thirty bushels to the acre and 20c. a bushel, $48,000; aggregate, $174,000.00. In 1881 he estimates crops were worth $500,000. In 1888 he estimates crops, wheat, $504,000; corn, $180,000, aggregating $684,000. These figures are corroborated by Defendant John H. Bramwell (Rec., p. 314).

Speaking of the crops in 1880, Defendant Murray, one of the drainage commissioners under the new drain-

age district of 1880, says: "In 1880 I went across the bottom in all directions. Everything was in wheat. As fine a prospect as I ever saw. Corn was splendid, sixty to sixty-five per cent of the district in cultivation. Would think that the wheat would yield from sixty to sixty-five bushels to the acre, about $1.00 a bushel" (Rec., p. 122).

Defendant Prince thus describes the effect of the building of the levee before the first break: "Everybody got rich; one man paid ten dollars an acre, another twenty, thirty, forty, fifty, anywhere. Too valuable to be transferred, a kind of Garden of Eden. I made a little money by buying at $100.00 and selling at $300.00."

Testimony of Defendant Prince, Rec., p. 143.

Defendant Clark "was buying, selling and handling land. Values increased to 1876 a great percentage. Land was worth at one time $12.00 more an acre. * * * Everything was booming."

Testimony of Defendant Clark, Rec., p. 119.
Testimony of Defendant Fesler, Rec., p. 171.

In a general way lands advanced probably $1,009,000.

Testimony of Defendant Clark, Rec., p. 246.

The protection of these lands by levees had, for many years before the passage of the act of April 24th, 1871, been the subject of consideration and discussion among the owners and occupants thereof as well as among those who knew their condition and their prospective value, and several ineffectual attempts to construct a levee had been made, so that before the passage of the act of April 24, 1871, owners and occupants of and persons interested in said lands well knew that an act of the Legislature of the State of Illinois was absolutely necessary under the pro-

visions of which the owners and occupants of the lands could be united and a common agency created and authorized to make all necessary plans, estimates and contracts for the construction of a levee, and to borrow money therefor by the issue of bonds or otherwise, to be secured and paid by assessments on or pledges of the lands benefited.

It resulted that during the session of the Legislature of Illinois in 1870 and 1871, the defendant Charles N. Clark, with money advanced for the payment of his expenses by other defendants named, and with the knowledge and approval of very many if not all the then known occupants and owners of said lands, procured the passage of the act of April 24th, 1871, by Legislature of the State of Illinois, under which said owners and occupants believed and expected the reclamation and protection of said lands would be effected. (Clark's testimony, Record, p. 58 et seq., 77 et seq.) Immediately after the passage of said act the defendants, who were the owners and occupants of lands described in said Bound Book Exhibit "A," availed themselves of the provisions of the act and for the information of all interested caused it to be published at length, or in its substantial parts, in the Hannibal Courier and Pike County Democrat and other newspapers which were published and circulated in the cities of Quincy, Hannibal and Louisiana, and Clarksville and Pittsfield, and also had a large circulation among the owners and occupants of said lands. In addition to these publications, public meetings, called and extensively advertised by Clark and others named in the proofs, were held at various prominent points in the district of lands intended to be reclaimed and protected, and in its immediate neighborhood. At these meetings, which were largely attended, Clark and others inter-

ested read and explained the provisions of the act of April 24th, 1871, which were approved and accepted by the owners and occupants of said lands, and they devised a plan for the organization of a corporation by them, called the Mississippi Levee and Drainage Company, with a capital stock of $100,000 to raise the money to put said act into effect. (Clark's testimony, ubi sup.)

By the means above mentioned all of the owners and occupants of the lands and the persons interested in them were fully informed of the passage of the act and of the steps being taken under its provisions for the reclamation and protection of the lands. Many of the then owners and occupants of lands who are defendants to this suit are shown by the proofs to have organized and subscribed to the capital stock of this organization as shown by the Articles of Association and list of subscribers, which are in the proofs. (Transcript, p. 2124.)

Acting under these laws, certain of the defendants, within the provisions of the act of 1871, filed at the August term, 1871, of the County Court of Pike County, a petition under said act (a copy of which is given, Record, pp. 442-447), in all respects conforming to the requirements thereof, and praying for the appointment of commissioners in the premises. Due notice of the filing of such petition was given, and at its September term, 1871, the said County Court of Pike County found that the proposed work was necessary and useful for the drainage of the lands, and appointed William Dustin, George W. Jones and John G. Wheelock, Commissioners, who duly qualified and organized as the Sny Island Levee Commissioners. (Record, p. 79.)

On the 23rd of November, 1871, these Commissioners filed a full report, answering all the requirements of the statute, accompanying it with the surveyor's estimates

and report, the map of the district, a copy of which is attached to this brief, Exhibit "D," and the profile of the work to be done, made by a competent engineer.

At the December term, 1871, of said Pike County Court, due proof of notice to all concerned was made, and the report of the Commissioners *was duly approved and confirmed without objection by anyone* (Rec., p. 391). A jury was ordered impaneled and duly sworn to examine the lands, assess the damages and benefits, and make out a proper assessment roll. (Record, pp. 79 and 391. Profiles are in transcript, but under stipulation not printed.)

The order summoned a jury of 12, although the act only required a jury of 6. This cured any objection to that provision in the act. (Campau vs. Detroit, 14 Mich., 376.)

The proceedings of the jury were regularly had upon due notice to all the parties interested, their report and assessments were filed with the Court, and spread upon the record. Certain appeals were taken from these assessments, but all the others were confirmed.

The Court directed that the assessments be paid in ten annual installments, commencing in 1882 with interest from the first day of October, 1872.

Certified copies of said order for Pike, Adams and Calhoun Counties, were made by the Commissioners and were recorded in said counties on or before December 18th, 1872. The Commissioners acquired the title to the lands required for the site of the levee, and in reliance upon said assessments, contracted for the construction and completion of said levee, issued bonds under an order of the Court to the amount of $499,500 and used them to construct the levee. The complainants' testator

purchased $202,500.00 of said bonds. (Testimony of Geo. W. Jones, Commissioner, Record, p. 81.)

It became necessary to raise an additional sum to complete the levee and a second petition was filed and proceedings similar to the first were had thereon, resulting in additional assessments of $148,500 (Record, p. 81), which were made payable in 1892, 1893 and 1894 (Book Exhibit "10"). Upon these assessments the Commissioners issued under orders of Court and sold to the complainants' testator through the contractors who built the levee, bonds to the amount of $148,500.00 and expended the same in the construction and completion of said levee. The complainants' testator purchased said bonds, relying on the facts before mentioned and upon the further fact that the Commissioners had paid the interest for the years 1873 and 1874 on the bonds which he held.

The levee as constructed cut off at one point the outlet of a stream, upon which Shaw & Rupert had a mill site and were operating a mill, naturally destroying their water power and being a damage to them. They commenced legal proceedings in the Federal Court in Illinois to abate the levee at that point, and a decree was rendered in their favor by Judge Drummond. In order to avoid the decision the levee commissioners and certain of the land owners agreed upon a sum in settlement of the claim of Shaw & Rupert and adjusted the matters in difference. This litigation and its settlement was a matter of intense local interest and wide notoriety, and for a time strained the relations between the commissioners and land owners, because the commissioners purposed to carry out Judge Drummond's decree and break out the levee at its

crossing of the stream unless Shaw & Rupert were made good.

The contractors constructed the levee upon the location chosen by the levee commissioners in accordance with their contract and the plans and specifications and surveys of the commissioners, to the approval of the engineer in charge, who by the contract (Rec., p. 366) was made sole referee of all questions arising thereunder (testimony of Jones ubi sup.; E. L. Corthell, Record, p. 365; H. W. Parkhurst, Record, p. 344) to such a height that the lands were protected from overflow by the Mississippi River and were reclaimed and rendered healthy and productive.

The levee was completed in May, 1875 (Rec., p. 369), the commissioners using for a part of it the railroad embankments of the Chicago & Alton and Chicago, Burlington & Quincy Railroads.

After the completion of the levee the commissioners, perhaps for lack of funds, did nothing to protect, maintain or repair the levee, which, being new, was particularly subject to injury from the action of the elements, wave action and the burrowing of animals. Because of this want of care the high water of April, 1876, caused a break at the head of the Sny and a more extensive one through the railroad embankments nearly opposite Hannibal.

The Commissioners had made after 1875 some effort to collect some installments of interest on said assessments, under an act of 1872 providing for the collection of said assessvenhs "in the same manner as State and County taxes" which were resisted by certain land owners, and in January, 1876, the Supreme Court of Illinois, after said levee was wholly constructed,

refused to enforce their collection on the ground that the act of 1871 was unconstitutional because it was not within Section 31, Article IV., of the Constitution of the State, and because the General Assembly of Illinois had no power under Section 5, Article IX., of the Constitution of the State to vest the Commissioners or jury selected or the County Court with authority to assess and collect taxes or special assessments for the contemplated improvement. (Updyke vs. Wright, 81 Ills., 49, and Webster vs. People, unreported.)

After the break in the levee of 1876 and a subsequent one in 1880, although the whole amount of complainants' bonds and those of others were unpaid, the Commissioners, at the reques of the land owners, continued in possession of said levee, and by the use of it protected their own lands and the lands of the other defendants from overflow, with a fund for keeping the levee in repair provided by certain land owners by conveying to said Commissioners, by deeds of trust, about thirty thousand acres of land.

These trust deeds described the grantees therein as "Commissioners appointed by the County Court of Pike County under and by virtue of the Act of April 24, 1871"; recited the construction of the levee under said act and the decision of the Supreme Court of Illinois against the validity of the assessments, and authorized the trustees within certain limitations to assess on the lands thereby conveyed, annual assessments up to fifty cents per acre for such amounts as were deemed by the Commissioners necessary to maintain and keep said levee in repair, but forbade the assessment of any sum to pay for the construction of the levee. Under these deeds much money was raised and expended upon the levee. (Trust deeds, Record, p. 460.) The answer admits $30,000. (Record, pp. 55-33.)

Not before the 26th day of January, 1887, did the Commissioners cancel and release these trust deeds, and then this was done in pursuance of another and more extensive scheme for continuing said levee, namely, the organization of the Sny Island Levee Drainage District, hereinafter more fully described.

In the meantime, on the 4th day of May, 1878, while these trust deeds were in force and the Sny Island Levee Commissioners were collecting moneys by means thereof, Francis Palms, the complainants' testator, filed a bill on behalf of himself and others against the Sny Levee Drainage Commissioners in the Circuit Court of the United States for the Southern District of Illinois in Equity. It is the original bill to which the bill in this suit is supplemental and in revivor.

The bill charged more fully and at length the facts hereinbefore stated, with the additional averments that all the owners and occupants of the lands assessed had full knowledge that the entire expense of said levee was paid for by said Commissioners out of the money received from said Palms and other purchasers of bonds. (Record, p. 410; statement of contents of same, Record, pp. 9-14.) In it Complainant Palms prayed among other things for a decree for an accounting of the moneys received from him by the Commissioners as aforesaid and used in the construction of the levee and the interest thereon; that he have for such amount a lien upon the levee and works and the lands acquired by the Commissioners for the site thereof and upon the assessments and interest thereon upon the other lands described in Exhibit "A;" that the Commissioners be ordered to proceed to collect said assessments and interest under the order and direction of the Court;

for the appointment of receivers to take charge of said levee and all books and papers of said Commissioners and to collect under the direction of said Court said assessments and interest; and for other and further relief. (Record, pp. 13 and 19.)

The defendant Commissioners, on the 13th day of March, 1879, filed their answer to said bill, admitting substantially all the material allegations therein and specifically admitting *that they had accepted the levee when it was completed by the contractors, and received it as a complete levee, sufficient in hight and strength to protect said lands from overflow.* (Original answer, Record, p. 429; statement of contents, Record, pp. 14-16). In said answer they claimed that because of the registration of said bonds with the Auditor of Public Accounts of the State of Illinois that the bond owners had thereby elected the mode prescribed by the supplemental act of 1872 for the collection of interest on said bonds and that they, said Commissioners, were by said election relieved from the duty of looking after the same, and were not responsible for the failure to collect the moneys to pay said interest, and were without any duty to perform in respect to said assessments; that certain land owners had at all times opposed the proceedings which subjected their lands to assessments for benefits on account of said levee, and had refused to pay interest accruing on said assessments, and because of this, other land owners otherwise inclined to pay their assessments, saw the futility of so doing, unless payment could be enforced against all alike, which resulted in a return by the township collector of all or nearly all of said lands as delinquent. Thereupon the County Collector made application for judgment on assessments against said delinquent lands to the Pike

County Court, and some of the land owners so opposing said assessments filed objections to the judgment, setting up that the law under which the assessments were imposed, was unconstitutional. That the Commissioners employed counsel and the County Court gave judgment against the lands. The resisting land owners appealed to the Circuit Court, and thence to the Supreme Court of the State, and the final judgment rendered by that Court was adverse to the right to collect said assessments, and they submitted that the decision of said case was decisive against any right upon their part to enforce any payment of any assessments in any manner.

They also averred that "as Commissioners they are not now, and never have been in any actual possession of any part of said levee, except for the purpose of constructing, maintaining and repairing the same; and they are advised and believe they never had title to any portion of said levee on account of the unconstitutionality of the law under which said work was done; and since said law was declared unconstitutional these respondents have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair."

Thereupon, on March 13th, 1879, the said cause was set down for hearing upon bill and answer, and after argument and consideration by the Court, the United States Circuit Court for the Southern District of Illinois, in Equity, Circuit Judge Drummond presiding, entered a decree containing among other matters the following provisions:

Decree of Judge Drummond, March 13, 1879.

"That the defendants retain the right of way, levee and other works, and keep and preserve and protect the same under the order and control of this Court *for the benefit of the complainants and all other persons interested therein.*"

"That the complainants and all other persons who may have advanced money to the defendants for the right of way, for the construction of said levee and other works, or who may be the holders of any of the bonds issued by the defendants to raise money for the purposes aforesaid, who may come into this suit and contribute their proper proportion for the expenses thereof, have liberty to go before the Master and produce their bonds and coupons, and make proof of the amount due them of principal and interest."

Said decree referred the cause to John A. Jones, Master in Chancery, to take proofs, upon proper notice, of the amounts due the complainants, and other parties, and to make report to the Court with such proofs of the amounts found due by him to each and every party who appeared before him, with the grounds of his several findings, and also provided that after the coming in of said report, and the approval thereof by the Court:

"The said complainant, and other persons, have the liberty to exhibit and file their supplemental bill or bills against any or all of the present or former owners of the lands alleged in said bill to be benefited by said levee, to compel them to contribute to the payment of the amounts found due, as aforesaid, and for such other and further relief as they may be advised they are entitled to," * * * "and the said complainant is at liberty to use the names of the defendants in such supplemental bill if they are advised it is necessary for them to do so upon tendering sufficient indemnity." (Record, pp. 437, 438.)

Decree of Judge Drummond, July 7th, 1880.

July 7th, 1880, Judge Drummond rendered a further decree in said cause, overruling the exceptions of defendants to said Master's report, and confirming and approving the same and adjudging the amount of interest due to the complainants' testator up to that date.

Said decree further declared "that the several sums of money so found due are a lien upon the assessments made under the order of the County Court of Pike County, upon the lands described in the bound book (Exhibit "A") with complainants' bill, and upon the said lands as provided in the 27th and 35th Sections of an Act of the General Assembly of the State of Illinois entitled "An Act to provide for the construction and protection of drains, levees and other works," approved April 24th, 1871, "and it further appearing to the Court that the defendant Commissioners have no money in their hands for the payment of the amount so found and adjudged to be due the said several complainants, and it also appearing to the Court from the allegations of the complainants' bill, and not denied by the defendants in their answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the Court that the complainants have the right and liberty to proceed in this Court in the names of said defendants as complainants as such Commissioners or in their own names as complainants against the lands described in said Exhibit "A," and the owners thereof, or such lands and the owners thereof, and other persons and said Commissioners, as they may be advised are liable for or bound to pay the sums found to be due to the

complainants as aforesaid, jointly or severally, by a bill or bills, original or supplemental or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit." (Record, pp. 438 to 441.)

After the decision of the Supreme Court of Illinois in the Webster case, and after the filing of this original bill by Palms, and while the Commissioners were in possession of the levee, the People of the State of Illinois, at an election held November 5, 1878, adopted an amendment to Section 31 of Article IV. of the Constitution of the State, to read as follows:

"The General Assembly of Illinois may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by a special assessment upon the property benefited thereby." (Star & Curtis' Annotated Statutes of Ill., p. 122.) This amendment was proposed in the Legislature of Illinois by A. C. Mathews, one of the defendants. (Record, p. 87.)

Under the authority of this amendment the General Assembly of the State of Illinois passed "An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes and to provide for the organization of drainage districts." Laws of 1879, p. 120, Star & Curtis' Annotated Statutes, p. 919.

Levee Law of 1879—Petition for Formation of District Thereunder.

The answer in this case admits that the submission of this amendment and its adoption by the people, and the passage of this statute was secured in part by the efforts of some of these defendants. (Record, pp. 55-4 to 55-57.) This act was also introduced in the Legislature by A. C. Mathews, one of the defendants in this case. (Record, p. 87.) "A copy of so much of this act as is material is attached hereto, marked Exhibit 'C.'"

It took effect May 29, 1879. It provided for the formation of drainage districts to construct drains, ditches and levees for agricultural, sanitary and mining purposes, and also drainage districts to maintain and keep in repair any such drains, ditches or levees "heretofore constructed under any law of this State." Section 2. And in cases where a levee had been theretofore built "under any law of this State," the annual assessments for keeping the same in repair were made due and payable on the first of September.

The Supreme Court of Illinois say, in Blake vs. People, 109 Ill., 504, that "the only law to which this could refer was the" (levee and drainage) "act of April 24, 1871." The Supreme Court of Illinois held this act constitutional in Huston vs. Clark, 112 Ills., 344, and in Osborn vs. People, 103 Ills., 224, that the validity of the district organization could not be attacked collaterally.

Thereafter, on the 26th day of January, 1880, a number of land owners, whose lands were described and included in the original assessments for the construction of the levee and in the original bill filed by Francis Palms, filed a petition, conforming in substance to the requirements of said last mentioned act. In said petition they describe the route, terminus and character of the original

levee, alleging that it "was constructed under the laws of the State of Illinois, then in force in the Counties of Adams, Pike and Calhoun, in the years 1872, 1873 and 1874." They alleged that while the purpose was desirable the levee had not accomplished it. They further allege that "by proper repair and maintenance of said levee, the lands aforesaid" (being part of the lands described in the original bill of Palms and in this bill filed by his executors, amounting in the aggregate to about 90,000 acres) otherwise of little value "would be reclaimed and brought into cultivation, and that, in addition, "it would greatly improve the sanitary condition of the locality through which said levee passes." They also alleged that it was absolutely necessary for the health and proper drainage and protection of said land, that said levee be "repaired as speedily" as possible; that the cost and expense thereof and the damages occasioned thereby, together with the annual expense of keeping the same in repair, would be less than the benefits to the lands affected by said repairs. They appointed the defendant A. C. Mathews to make any amendments to carry out the purpose of the petition.

They expressly confined their petition to repairing and maintaining the old levee and used no words which gave them any right to build a new levee. Their object in so doing was to acquire all the rights of way and easements of the old levee and to obtain a color of title to it in its entirety. (Rec., pp. 31-33.) In this petition the descriptions of lands to be benefited or damaged by the repair

and maintenance of said levee were substantially the same as those contained in Bound Book Exhibit "A" to the original bill of Mr. Palms. Bound Book Exhibit "X" and Book Exhibit "10."

They then prayed that a drainage district, to be known as the Sny Island Levee Drainage District, be formed out of the said lands subject to periodical overflow by the Mississippi river in the townships aforesaid, *for the repair and maintenance of said levee, according to the statute,* and that commissioners be appointed with the powers and authority named in the Act of May 29th, 1879, and that they be directed to do all acts provided in said law for repairing levees, ditches and drains from assessments to be ordered, and for other and further relief. (Answer of defendants, pp. 55-4 et seq. Bound book, Exhibit "10," Record, p. 499.)

Such proceedings were had therein that the County Court of Pike County, by all necessary and legal orders, duly created the Sny Island Levee Drainage District, which, in the year 1880, received the surrender of the levee from the original Sny Levee Drainage Commissioners, and took possession and control of the levee and other works, and still has control and possession thereof, with the knowledge and consent and approval of the defendant Commissioners in the Palms suit, and of all the defendants in this suit, who had also notice that the said levee had been built in part by the money received for that purpose from said Francis Palms. (Answer of defendants, Record, pp. 55-4, Bound Book Exhibit "X" and Book Exhibit "10.")

Naturally there were some breaks in the levee caused by the unusual height and volume of the river while the levee was new and had not settled, and the repair and protection thereof were neglected, and in 1880 the extraordinary height and volume of the Mississippi river caused

Death of Mr. Palms—Filing of Present Bill—Maturity of Installments of Assessments and of Bonds.

extensive breaks and did much damage to the settlements on the bottom lands between the levee and the bluffs of the river bank. Since then there had been but one break—in 1888—and the levee has settled and grown firm until it is now as solid and secure as the natural river bank.

On the 24th day of November, 1886, the complainant in the original suit died, and on the 4th day of January, 1889, the complainants in this suit, who had qualified as executors and trustees under his will, were authorized to continue the prosecution of said suit, and filed the present bill by leave of court.

The complainants are still the owners and holders of all the bonds described in the original bill of said Francis Palms, deceased, and in the report of the Master as aforesaid, and the defendants have not paid any moneys whatsoever on account of the said bonds or the interest thereon, except interest for the years 1873 and 1874, as above stated. (Testimony of Mr. O'Brien, Record, p. 372.) The bonds belonging to the complainants which have become due were again specifically produced and proved before the Master in this case.

The installments of the first assessment levied in 1872, which fell due prior to the filing of this bill in 1889, were for $50,000 in each of the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, aggregating $350,000. (Record, p. 22.) None of the installments of the assessment of 1875 were due when the present bill was filed, as this assessment was made payable in 1892, 1893 and 1894. (Book Exhibit "10.") None of Mr. Palms' bonds fell due until July, 1883. In that year $28,000.00 matured, $6,000.00 in 1884, $9,000.00 in 1885, and $13,000.00 July 1, 1886.

Acts of Estoppel—Soliciting Passage of Act of 1871—Organization of Mississippi Levee Drainage Company —Appropriation of Levee.

It appears from the proofs that the defendant Commissioner Westlake died and no successor has been appointed to fill his place, but the other defendants, Wheelock and Jones, remained Commissioners as aforesaid.

The proofs also show that very many, if not all, of those of said defendants who have acquired title to any portion of said lands since the levying of the assessments of 1872 and 1875, respectively, took the same with full notice of the existence of such assessments, and the proceedings in the Pike County Court in relation thereto, and the issue of bonds by the Commissioners, and the sale thereof, as well as notice of the expenditure of the proceeds thereof in the construction of said levee, and that the levee was constructed solely with the money thus furnished, and that those moneys have not been repaid. They also show that the defendants, with like knowledge and notice, have appropriated and used said levee in the protection of their lands from overflow by the Mississippi river, for a long time past, and still so appropriate and use the same, but none of the defendants have, since the years 1873 and 1874, ever contributed any sum of money whatever for the reimbursement of complainants' testator for the moneys advanced for the construction of said levee.

They show that certain defendants participated in the issue and sale of said bonds to complainants' testator, and in causing said proceeds to be expended in the construction of said levee by actively soliciting and procuring the passage of the act to provide for the construction of levees, approved April 24th, 1871. That certain other defendants participated in causing the bonds to

be issued and sold and the proceeds expended in the construction of the levee by subscribing to the stock of the Mississippi Levee Drainage Company, organized for the purpose of giving effect to the act of April 24, 1871, and to raise money to do the necessary work prior to the steps taken in the County Court for Pike County. (Clark's testimony, Record, p. 59.) That certain other of the defendants are purchasers with notice from the last described land owners.

That all the defendants who acquired title to the lands now claimed by them since May 4th, 1878, are purchasers with notice because the original bill of the complainants' testator was filed on that day, and is still pending and of record in this Court; that in addition to the pendency of said bill the decrees thereupon of March 13, 1879, and July 7, 1880, putting the levee into the hands of the Commissioners as receivers were full notice of the complainants' equities, to any subsequent purchasers of the lands in question.

That certain of the defendants participated in causing the bonds to be issued and sold and the proceeds expended in the construction of the levee and in causing the assessments to be made on the lands benefited by said levee (specifically described in Bound Book Exhibit "A") by signing and presenting the original petition for the construction of said levee to the Pike County Court in August, 1871. (Record, pp. 55-40, original petition; Record, pp. 442 to 447.)

That certain other defendants are purchasers with notice from the last named defendants.

Acts of Estoppel—Trust Deeds—Amendment to Constitution of 1878—Purchasers with Notice.

That certain other defendants participated in procuring the issue and sale of said bonds and the expenditure of the proceeds thereof in the construction of the levee and in causing the lands to be assessed by order of the Pike County Court by filing on the 30th day of November, 1874, the petition for the second assessment in 1875. (Record, pp. 55-40.)

That certain other defendants are purchasers with notice from some of the last named defendants.

That certain other of the defendants, well knowing that the levee had been constructed with the moneys of the complainants and others, and that the amounts of complainants' bonds and interest thereon were wholly unpaid, and knowing and consenting to all of the proceedings of the Pike County Court, and having authorized the assessments of their lands for the payment of the principal and interest of said bonds, combining with the defendant commissioners, whose duty, as said defendants well knew, was to collect said assessments and pay the amount thereof to the complainants in discharge of the principal and interest of said bonds and for the purpose of defeating the just claim of defendants, procured the defendant Commissioners to take excusive possession and control of the said levee as their agents and claiming to act in their private capacity and use and appropriate the same to the protection of their lands with the powers and under the provisions of certain trust deeds, which said trust deeds stipulated that no part of the funds collected by means thereof should ever be applied upon the indebtedness created by or on account of the original construction of said levee. (Record, pp. 55-41.)

That certain other defendants were purchasers with notice from some of the last named defendants.

Acts of Estoppel—Petition for Formation of Sny Island Levee Drainage District—Parties and Proceedings Thereunder—Deeds Excepting Levee Assessments from Warranty—Heirs at Law Purchasers with Notice.

That certain other defendants actively participated in procuring the submission by the Legislature of Illinois and the adoption by the people of the constitutional amendment of 1878 and the passage of the act of May, 1879, under the provisions thereof.

That certain other defendants filed the petition in the Pike County Court for the creation of the Sny Island Levee Drainage District with the expressed purpose of repairing and maintaining the levee originally constructed under the Act of 1871 and were parties to the proceedings therein. (Record, pp. 55-41, 55-48.)

That certain other defendants are purchasers with notice from some of the last named defendants.

That certain other defendants were interested in the lands in which they are now interested and which are described in Bound Book Exhibit "X" on the 26th day of January, 1880, when the petition for the organization of the Sny Island Levee Drainage District was filed, and in pursuance of the statute were severally made parties to and had due notice of and are bound by all of the proceedings for the organization of said Drainage District.

That certain other defendants are purchasers with notice from some of the defendants last named.

That certain other defendants are heirs-at-law of ancestors or devisees and legatees of persons who took part in some or all of the proceedings before mentioned, by which said bonds were issued and assessments levied and the levee constructed.

Annual Assessments by Sny Island Levee Drainage District—Condition of Lands Before Levee.

That certain other defendants have acquired title to the lands in which they are now interested as set forth in said Bound Book Exhibit "X" through deeds of conveyance expressly recognizing and agreeing to pay the liens of the assessments upon said tracts of land for the amounts advanced by complainants' testator for the construction of said levee and other works.

That every one of the defendants have by the payment of assessments by themselves or their grantors, made upon their lands by the said Sny Island Levee Drainage District, having at the time of such payment full knowledge that the levee and other work were constructed with the funds furnished by complainants' testator and of the decrees of the United States Circuit Court for the Southern District of Illinois of March, 1879, and July, 1880, declaring a lien in favor of the complainants' testator, and also having full knowledge that no part of the amounts due to the complainants had been paid, approved and ratified the acts of said Sny Island Levee Drainage District in appropriating the said levee for the protection of the said lands of said defendants.

That said Sny Island Levee Drainage District has annually since its organization made large assessments upon nearly all said tracts of land which are rightfully subject to the lien of the assessments for the payment of complainants' bonds, for the purpose of raising money to pay the cost of the repair and maintenance of said levee, and that said defendants pretend that said assessments are a lien upon said lands paramount to complainants' lien, and said defendants intending to defeat the just lien of complainants by certain pretended proceedings in some court, have caused many of said tracts to be sold for

the assessments made through said Sny Island Levee Drainage District and have caused deeds to be made on said sales.

That before the construction of said levee the entire body of lands which includes the tracts assessed for the construction of the said levee and each of the tracts thereof, was so wet and swampy and subject to such frequent overflows by the Mississippi River that they did not exceed in value an average of fifty cents per acre. That while the average assessments per acre greatly exceeded the then market value of said lands, it was expected and promised by the land owners and the commissioners that the construction of said levees as proposed, would drain said lands and protect them from overflow, render them healthy and productive, and so greatly enhance them in value as to make them ample and desirable security for said assessments.

That complainants' testator, relying upon said representations, was induced to purchase and pay for said bonds, in the belief that after said levee was completed said lands would be drained and protected from overflow and made healthful and profitable for cultivation and enhanced in value to an average of twenty-five dollars per acre, and that thereby the assessments on said lands would become an adequate security for the amount of said bonds.

All the defendants who appeared demurred to the Bill of Complaint in this case on the following grounds:

(1) Want of equity in the bill.

(2) That the claims of the complainants have become stale, and by reason of the complainants' negligence in pressing and enforcing their rights, are not now enforceable against the defendants.

(3) That complainants and their testator have been guilty of laches and have so long remained idle that the rights of many outside persons have intervened so that complainants are estopped to assert their rights against the defendants.

(4) That the allegations in the bill do not raise any implied promise on the part of the defendants, nor any equitable obligation to pay the bonds or any sum of money.

(5) That the facts alleged in the bill do not entitle complainants to any lien or charge upon defendants' lands.

(6) That the complainants' remedy is at law.

Upon the argument of the demurrers, Messrs. Hay, Greene & Humphrey assigned as additional grounds of demurrer *ore tenus;* that this court had no jurisdiction to collect the assessments in the mode prayed for in the bill, nor in any other way, and depending thereon, that there is *no lien on the lands* in favor of the complainants.

These grounds of demurrer raised all the questions of law which were afterwards raised at the final hearing except (1) the question of the sufficiency of the original construction of the levee and its conformity to the requirements of the contract, and (2) the effect of sales of lands, on which drainage assessments had been levied for general taxes pending the litigation.

The demurrers came on for hearing before the Circuit Court of the United States for the Southern District of Illinois in equity, Judge Gresham presiding, and were all overruled.

Thereupon the demurring defendants and other defendants answered, full and extensive proofs were taken

and the cause submitted to United States District Judge William J. Allen on the 9th day of November, 1895. On the 10th day of February, 1897, he entered a decree dismissing the bill of complaint with costs. (Opinion, Record, pp. 474-489.)

An appeal was perfected on the 5th day of April, 1897, the record on appeal was filed in the United States Circuit Court of Appeals for the Seventh Circuit on the 30th day of June, 1897, and the cause came on and was heard on the 7th and 8th of June, 1898, before Mr. Justice Harlan, Circuit Judge Woods. Circuit Judge Showalter took part in the hearing, but died before the decision of the case, which was announced on the 6th day of June, 1899, by Mr. Justice Harlan.

The case comes into this Honorable Court on a writ of certiorari granted May 14th, 1900.

SPECIFICATION OF ERRORS.

The following errors are assigned *ex magna caute*, because they are perhaps technically necessary in view of the numerous classes of defendants embraced in the general language of the opinions and scope of the decisions below.

They can be argued and considered conveniently under the respective heads of the argument which follows and no specific examination of each error assigned will be required unless some question of their sufficiency is made by the defendants in error.

The errors relied upon, briefly stated, are as follows:

1st. That the United States Circuit Court of Appeals for the Seventh District held and decided that the lands intended to be benefited and protected by the levee constructed under the Act of 1871 could not be specially assessed by any action taken in conformity with the provisions of that act.

2nd. That said United States Circuit Court of Appeals held and decided that nothing was said or done by the owners of the lands so intended to be benefited and protected that estopped them to dispute the validity of the Act of 1871 and of all that was done under it, or that created any equity in favor of the holders of bonds to have said lands sold to pay and special assessment for the bonds issued to contractors.

3rd. That the United States Circuit Court for the Southern District of Illinois decided that the complainants, as purchasers of the bonds issued under the provisions of the Act of April 24, 1871, did not acquire an equitable right

to enforce the lien provided by said act, and that a court of equity has no jurisdiction to enforce the rights of complainants under the act.

4th. That said Circuit Court held that the defendants named in the bill and proofs, who caused and procured the passage by the General Assembly of the State of Illinois of the Act of April 24, 1871, and thereafter availed themselves of its provisions for the protection of their lands by the construction of the levee, might deny in a court of equity the constitutionality of the act and assert the consequent invalidity of the assessments made thereunder, and dismissed the bill of complaint as to them.

5th. That the said Circuit Court decided to the same effect with reference to the assessments upon lands owned by defendants who purchased with notice lands covered by said assessments from persons of the last described class.

6th. That the said Circuit Court decided to the same effect with reference to the lands belonging to the defendants named in the bill and proofs, who signed and presented the original petition for the construction of said levee to the County Court of Pike County, in the State of Illinois, in August, 1871, and dismissed the bill as to them.

7th. That the said Circuit Court decided to the same effect with reference to the assessments upon lands owned by defendants who purchased with notice lands covered by said assessments from persons of the last described class.

8th. That the said Circuit Court decided to the same effect in respect of assessments on lands owned by defendants named in the bill and proofs who filed the petition for the second assessment of 1875 in the Pike County Court of Illinois, and dismissed the bill as to them.

9th. That the said Circuit Court decided to the same effect in respect of the assessments on lands belonging to defendants who purchased with notice from persons in the last described class.

10th. That the said Circuit Court decided to the same effect in respect of defendants named in the bill and proofs who joined in the execution of certain trust deeds and procured the commissioners of the drainage district to take control of the said levee as their agents and use and appropriate the same to the protection of their lands.

11th. That the said Circuit Court decided to the same effect in respect to the assessments upon lands of defendants named in the bill and proofs who were purchasers with notice from persons of the last described class.

12th. That the Circuit Court decided to the same effect in respect of assessments on lands belonging to defendants named in the bill and proofs who procured the passage by the Legislature and the adoption by the people of Illinois of the constitution and amendment of 1878 and the passage of the Act of May, 1879, and dismissed the bill as to them.

13th. That the said Circuit Court decided to the same effect in respect of assessments upon lands of defendants named in the bill and proofs who were purchasers with notice from persons in the last above described class.

14th. That the said Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants named in the bill and proofs who filed the petition in the Pike County Court of Illinois under the Act of May, 1879, for the creation of the Sny Island Levee Drainage District and became parties to the proceedings therein.

Specification of Errors.

15th. That the said Circuit Court decided to the same effect in respect to assessments upon lands belonging to defendants named in the bill and proofs who were purchasers with notice from persons in said last described class.

16th. That the said Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants named in the bill and proofs who were made parties to and had due notice of and were bound by all of the proceedings for the organization of the said Sny Island Levee Drainage District.

17th. That the said circuit Court decided to the same effect in respect of defendants named in the bill and proofs who were purchasers with notice from persons in the last above described class.

18th. That the said Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants named in the bill and proofs who were heirs at law of ancestors or devisees of persons who took part in some or all of the proceedings above mentioned.

19th. That the Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants described in the bill and proofs who were purchasers with notice from persons in said last above described class.

20th. That the Circuit Court decided to the same effect in respect of assessments upon lands belonging to certain defendants named in the bill and proofs who have acquired their title through deeds of conveyance expressly recognizing the lien of the assessments upon said tracts of land for the amounts advanced by complainants' testator for the construction of said levee and other works.

Specification of Errors.

21st. That the said Circuit Court decided to the same effect with respect to assessments upon lands described in the bill belonging to certain defendants named in the bill and proofs who have by payment by themselves or their grantors of assessments made by the Sny Island Levee Drainage District, with full knowledge that the levee was constructed with the funds furnished by complainants' testator and of the Circuit Court of the United States for the Southern District of Illinois, rendered in March, 1879, and July, 1880, declared a lien in favor of the complainants' testator, and also having full knowledge that no part of the amount due to the complainants had been paid, approved and ratified the acts of said Sny Island Levee Drainage District.

22nd. That the said Circuit Court held and decided that the complainants' testator was guilty of laches in the prosecution of his claims under said bonds.

23rd. That the said Circuit Court held and decided that the purpose of the bill was to collect a tax.

24th. That the said Circuit Court held and decided that the transfers and conveyances of some of the lands upon which there were assessments for the construction of the levee had changed the conditions and relations of the party as to the subject matter of the suit, and that, therefore, the complainants could not have the relief prayed.

25th. That the said Circuit Court of the United States for the Southern District of Illinois decided that the act of April 24, 1871, was unconstitutional and void.

26th. That the United States Circuit Court of Appeals for Seventh Circuit decided that the act of April 24, 1871, was unconstitutional and void.

ARGUMENT.

To the case made by the complainants as above stated the defendants set up the same claims of defence which were raised by their demurrers set out on p. 30, *supra*, and decided against them. They may conveniently be grouped for the purpose of argument as follows:

a. That the levee act of April 21, 1874, is unconstitutional and void.

b. That the bill is to collect a tax and a court of equity has no jurisdiction.

c. That there is nothing in the case which estops them or any of them from asserting the invalidity of the levee act of April 24, 1871.

d. That the complainants and their testator were guilty of laches and thereby have lost their remedy.

e. That the levee was not properly located and was not constructed of sufficient dimensions and strength or in a proper manner to be a protective levee.

f. That the Sny Island Levee Drainage District and other defendants have purchased tax titles on many of the lands upon which assessments sought to be enforced by the bill were levied and have obtained deeds thereunder, which are paramount to the lien of the assessments.

As appears from the preceding statement, complainants seek to enforce severally against lands of certain defendants the liens of separate assessments for the construction of the levee, with the proceeds of which the levee was built,

upon the grounds 1st, that such assessments were levied in strict conformity with the terms of the statute of 1871, which was a valid law, and 2nd, that even if that statute was unconstitutional many of the defendants owning such lands are estopped to deny the constitutionality of said act and attack the assessments on that ground.

It is not a bill to compel contributions to, or collect proportionate amounts of, a gross sum, but is a bill in the nature of a foreclosure bill to enforce, on several and specific parcels of lands, the liens of several and specific assessments upon the faith of which the moneys which built the levee were advanced.

The case is not upon a bill to collect a tax and is not within the decisions of Berkley vs. Levee Commissioners, 93 U. S., 264, and Thompson vs. Allen, 115 U. S., 550.

It is entirely different from Litchfield vs. Ballou, 114 U. S., 190; Aetna Life Insurance Co. vs. Middleport, 124 U. S., 534, and cases of like character, in that the complainants in this case do not seek to hold any municipal corporation or any individual liable, directly or indirectly, at law or in equity, but simply ask the enforcement of certain special assessments against the lands of individual defendants, on the ground, 1st, that the levee law is constitutional and, 2nd, that it is not; that certain of the defendants have so conducted themselves in the premises, that they are estopped to allege any invalidity in the law providing for said assessments.

The federal courts can enforce liens created by State laws and have repeatedly done so.

Fitch vs. Creighton, 24 How., 159, a street opening assessment.

Idaho & Oregon Land Improvement Co., 132 U. S., 509, a mechanic's lien.

Argument.

The Levee Law of 1871 is Constitutional.

Jones vs. The Great Southern Fireproof Hotel Co., 86 Fed., 370.

Hagar vs. Reclamation District, 111 U. S., 701, a levee lien.

New Orleans vs. Warner, 175 U. S., 120.

After the issue of the bonds and the levy of assessments in this case the Supreme Court of Illinois, in Updike vs. Wright, 81 Ills., 49, decided that the Illinois Constitution of 1870 prohibited the Legislature from creating drainage districts. They put their decision upon the following section of the Constitution:

"The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform with respect to persons and property within the jurisdiction of the body imposing the same."

Art. IX., Sec. 9, Illinois Constitution.
Revd. Sts. Illinois 1874, p. 75.

The same Constitution also contained the following sections:

Article IV., Sec. 1: "The legislative power shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the people." Rev'd Sts. Illinois 1874, p. 60.

Art. IV., Sec. 4. "The General Assembly shall provide in all cases when it may be necessary to sell real estate for the non-payment of taxes or special assessments

for State, county, municipal or other purposes, that a return," etc. Rev'd Sts. Ills., 1874, p. 75.

"The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others." Art. IV., Sec. 31.

The last section was first introduced in the Constitution of 1870.

Obviously the broad grant of legislative power in Article IV., Sec. 1, would include the right to create levee drainage districts unless Article IX., Sec. 9, is a limitation of such power.

The legislative power of the General Assembly f Illinois "extends to everything within the sphere of that power, except as it is restricted by the Federal Constitution or that of the State."

> Township of Pine Grove vs. Talcott, 19 Wall., 636.

We respectfully submit that Article IX., Section 9, is not such a limitation.

The Supreme Court of Illinois, in People vs. Mayor, etc., 51 Ills., 30, said "To what extent Section 9, Article IX., Constitution of 1848, is to be construed as a limitation upon the power of local taxation by the Legislature itself, it is not necessary to decide. However strong the argument in favor of so construing it, there nevertheless may be cases where the Legislature, without the consent of the corporate authorities, might impose taxes, local in their character, if required by the general good government of the State, because such taxes would not be merely and only for corporate purposes."

Argument.

The Levee Law of 1871 is Constitutional.

The Constitution of Massachusetts conferred upon its Legislature under the title of the General Court

"Power to make ordinances and establish all manner of wholesome and reasonable ordinances, laws, statutes and ordinances as the general court shall judge to be for the good and welfare of this commonwealth and for the government and ordering thereof and of the subjects of the same."

This is the full equivalent of the language of the Illinois Constitution that "the legislative power shall be vested in a General Assembly."

The drainage laws of Massachusetts have been uniformly upheld.

A comprehensive drainage law was sustained in Sherman vs. Tobey, 3 Allen, 7.

The statute for the improvement of meadows was reviewed in the Supreme Court in Talbot vs. Hudson, 16 Gray, 417, and its constitutionality was sustained.

It came up and was again sustained in Coomes vs. Burt, 39 Mass., 422, which is referred to with approval and distinguished from the Boston Fire Case in Lowell vs. Boston, 111 Mass., 454. In the Boston Fire Case the Court say, p. 468: "In the statutes for the improvement of meadows the provisions for the assessment and collection of the expenses in form resemble taxation and the powers exercised over private property are sometimes ascribed to the right of eminent domain. But there is no taking for public use. It is a proceeding of a semi-judicial nature in which all those whose lands are affected are joined as parties. The action taken therein relates to that in which all have a common interest or in reference to which all are affected by a common necessity. That common necessity

is made and that common interest secured by subjecting the individual rights to such modifications as the commissioners may judge to be most practical to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard to the interests of all as well as of each. For this purpose they are treated as the owners of common property. Coombes vs. Burt, 22 Pick., 422. The Court also say, p. 469: "We find in these statutes no exercise of the right of eminent domain or of the governmental power of taxation that which in form resembles taxation, is, in effect, only an equitable apportionment among the parties to the proceedings, of the expenses incurred for their common benefit by their common agents, or rather by the officers of the tribunal charged by the Legislature with the conduct of these proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided."

To the same effect are the decisions in New York, Pennsylvania, New Jersey, Ohio and Indiana.

The validity of statutes of this character and the power of the Legislature to provide for the payment of the cost of the common benefit by special assessments are treated as settled law.

6 Am. & Eng. Encyl. of Law, p. 14, citing:

Idem, p. 12.
Hagar vs. Reclamation District, 111 U. S., 701.
Cooley on Taxation, pp. 101, 402, 403.
Cooley's Cons. Juris., 636-7.

Constitutionality of the Levee Law of 1871—State Court Decisions, Burgess vs. Seligman.

Tidewater Co. vs. Costn., 3 C. E. Greene, N. J., 518.
Reeves vs. Treasr., 8 Ohio St., 333.
Ross vs. Davis, 97 Indiana, 79.
Sessions vs. Crinkelton, 20 Ohio St., 349.
Meranda vs. Spinlin, 100 Ind., 380.

The construction adopted in Updike vs. Wright not only does violence to and renders nugatory the other provisions of the State Constitution above quoted, but it makes it impossible for the State of Illinois or any county, or school district therein to bridge a creek, improve a road, erect a school house or make any other local improvement.

They cannot do it by special assessment because they are neither cities, towns nor villages. They cannot do it by general taxation because it is only for other corporate purposes than making local improvements that municipal corporations can be vested with authority to assess and collect taxes. Surely such a construction, so disastrous to the prosperity of the State and the health and welfare of its inhabitants, should not be adopted unless the constitutional limitation upon the power of the General Assembly is so direct and positive as to admit of no other construction.

Moreover, this decision ignores Art. IX., Sec. 4, above quoted, and takes from the Legislature the express power granted in Article IV., Sec. 31, of the same constitution "to pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others."

Argument.

Constitutionality of the Levee Law of 1871—Differences in Constitutions of 1848 and 1870.

The Supreme Court of Illinois in construing the similar grant of power in the Constitutional amendment of 1878, say: "An express grant of power to do a certain thing without any words of limitation or restriction carries with it all necessary and proper means to make the power effectual, and the body to whom such power is given is in such case the sole judge of the means to be employed to give it practical effect, especially where that body, except so far as limited and restricted, has plenary power."

Huston vs. Clark, 112 Ills., 244, 349.

Updike vs. Wright was not decided *until after* the assessments had been levied, the bonds issued and sold, and the levee constructed in this case, and falls within the rule declared by this Court in Burgess vs. Seligman, 107 U. S., 20. To escape this rule defendants assert that previous decisions of the Supreme Court of Illinois interpreted a provision similar to Article IX., Section 9, in a former constitution (1848) in the same way.

This contention overlooks the material and important fact that the constitution of 1848 contained no such clause as Article IX., Section 31, empowering the Legislature to pass laws permitting owners or occupants of lands to construct drains and ditches across the lands of others. It is a fair presumption that the people of Illinois intended by inserting this section in the Constitution of 1870 to prevent these former decisions from restricting and hindering the proper drainage of their state, well knowing that, traversed as it was by the Mississippi, Ohio, Illinois and other great rivers, it was especially in need of extensive systems of drainage; that they had the experience and

decisions of Massachusetts in view and intended to give the Legislature equally broad powers in respect of large and important systems of drainage which were demanded by the common good and should not be prevented by individual selfishness.

The two sections are quite different in their grant of power. That in the Constitution of 1848 confines the delegation of power to "taxes for corporate purposes which shall be uniform in respect of persons and property." It does not speak of special assessments. While the section in the Constitution of 1870 includes special assessments.

The constitution of 1848 read "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for c o r p o r a t e purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same," and the Constitution of 1870 reads the General Assembly "may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments or special taxation of contiguous property or otherwise."

This levee was not a "corporate purpose" of "any county, township, school district, city, town or village." Neither was it a local improvement of any "city, town or village."

It was a much needed sanitary and drainage improvement of a large territory comprehending many townships, but wholly disassociated from the corporate purposes or needs of any of them.

It is a strained and far too strict a construction to hold that this clause is a limitation on the legislative power to

provide for systems of drainage across the lands of others by special assessments on the lands benefited.

It should be borne in mind that Updike vs. Wright was a case of a levee alone not connected with any system of drainage whatever, while the Sny Levee was essentially a part of an extensive system of draining the lands it protected, by utilizing the Sny for that purpose, in connection with a canal constructed in connection with and at the lower end of the levee.

EVEN IF THE LEVEE LAW IS UNCONSTITUTIONAL, ASSESSMENTS ARE VALID ON LANDS OF ESTOPPED DEFENDANTS.

But in case the Court should be of opinion that the construction of the Illinois Constitution by the Supreme Court of that State is the correct one or that this Court is bound thereby, the complainants still are entitled to recover special assessments on the lands of those who have estopped themselves to assert the unconstitutionality of the levee law.

The benefit of this estoppel is claimed for:

1st. The assessments against lands belonging to defendants who are estopped by conduct previous to the purchase by complainant's testator of the bonds issued by the levee commissioners in payment of the expense and cost of the location and construction of the levee.

2nd. The assessments upon lands belonging to defendants, who by acts of appropriation of the levee and ratification of the conduct of others appropriating it, with full knowledge of the benefits to be had from it, and that it was built with the money of the bondholders have and

still are receiving the benefit of its protection to their lands, thereby precluding themselves from now setting up the unconstitutionality of the law under which the assessments were levied.

It is not contended that defendants are concluded by the assessments. It is admitted that they may assert any defect in the proceedings under the statute or any want of conformity to the requirements of the statute, but the claim is that they cannot attack the validity of the statute which they have held out to the bondholders as an inducement to invest their money in the bonds.

In considering this question of estoppel it is important to bear in mind the character of the levee.

It is obvious that the enterprise of constructing such an immense work must have been a common undertaking of many individuals, and that everyone in the neighborhood or certainly along the line of the levee would have knowledge of its inception, progress and completion. So that while only specific acts of certain individuals are shown, they must be considered in the light of the common scheme and plan of all to build a levee, and not merely as separate and independent acts.

The proofs show:

That certain defendant land owners formed and subscribed to the stock of the Mississippi Levee Drainage Company "for the purpose of carrying into effect" the levee law of 1871 (Record, p. 59), "and which furnished the means necessary to do the preliminary work." That numerous public meetings were held in the leading towns of Pike County in and near the levee district, which were quite freely advertised by handbills, at which the law was read and its provisions explained and contributions were

obtained from defendant land owners for the preliminary work under the act of 1871. Articles to like effect were published in Hannibal Courier. (Record, pp. 60-62.) Other defendant land owners petitioned the County Court of Pike County to commence proceedings under the act, one hundred and thirteen in first petition (Record, p. 447), and one hundred and twenty-three in the second petition (Record, pp. 26, 27, 442); that all resident land owners had personal, and all non-resident land owners constructive, service of notice of said petition; that none took any steps to restrain said proceedings, but all stood by and encouraged the work until it was completed; that Wheelock and the other commissioners "acting for such land owners" authorized the publication of Pamphlet A (Record, p. 385), which contained opinions of eminent counsel that the law was constitutional and the proceedings under it valid, and the certificate of the commissioners (Record, p. 390): "*There is no opposition to the improvement, but on the contrary, it is unanimously demanded by the owners of the land.*" and also contained a like certificate of the Judge of the Pike County Court; (Record, p. 391) that interest assessments were paid by the land owners, and the interest on the first issue of bonds was paid to Palms for 1873 and 1874 by the commissioners (Record, pp. 385, 410), thereby inducing Palms to take the whole issue of 1875 in the sum of $148,500. (Record, p. 372.) The defendant Wheelock was a land owner and one of the Levee Commissioners. The record shows the following acts of estoppel as to him: "He knew Clark was undertaking to get the law through the legislature (Record, p. 167), signed the petition for the appointment of commissioners and the institution of proceedings under the act (Record, p. 446), accepted the office of commissioner (Record, p. 66), was active in the pro-

ceedings to acquire title to the site of levee by voluntary deeds, made a written report to the Court; executed the contract for the construction of the levee (Record, p. 67); paid the interest on the bonds for the years 1873 and 1874 (Record, pp. 385-410); authorized the publication of the pamphlet containing the certificate of the commissioners (Record, pp. 389-390), "that there was no opposition to the improvement, but on the contrary, it was unanimously demanded by the owners of the land," and containing opinions of eminent counsel that the proceedings were valid and the assessments legal (Record, pp. 387-9); delivered the bonds to the contractors in payment of their work; accepted the trust under the trust deed and collected assessments thereunder to repair and maintain the levee (Record, p. 68); held possession of the levee as receiver under appointment of the Federal Court in the original bill filed by Mr. Palms in the Federal Court; without authority from that Court turned it over to the present Sny Island Levee Drainage District, which still holds possession of it and with it *protects his lands from overflow.*

Defendant Clark's conduct and acts of estoppel are, if possible, more binding. He was the head and front of the whole scheme from its very inception; procured the drawing up and passage of the law; called and addressed meetings of land owners to get action taken under the law; got up the Mississippi Levee Drainage Company; as he says, "officiated as the organizer generally and did all the talking" (Record, p. 60); went over the proposed route of the levee with commissioners and commissioners' engineer; obtained, with assistance of Mr. Chamberlain, another defendant land owner, the signatures to the petition to the Pike County Court; went with the cimmissioners' engineer and jury when they viewed the route and made their as-

sessments; "made all the publications the law required:" posted the notices; was up and down the levee so often that his "horse got so that he knew the places almost;" in fact, did everything in his power to get the levee constructed by money and work advanced on the faith of the act. (Record, pp. 58, 65, 77, 93, 106, 114, 246.)

The record also shows that many other defendants who are specifically named participated in some or all of the above named ways in invoking action under the statute of 1871 and inducing contractors and others to invest their money in the enterprise upon the faith of the assessments to be made under the law.

The Court of Appeals for the Seventh Circuit held that none of the defendants were estopped from setting up the unconstitutionality of the law as a defense to the bill.

With great deference to the learning and ability of that Court, we submit that this holding was erroneous.

An equitable estoppel arises when one person has induced another to act upon the supposition that a state of facts exists which does not exist in fact or has pursued a course of conduct in respect to his own property or rights which has led another into expenditures which are to be lost if the party so misleading is afterwards allowed to assert rights inconsistent with such course of conduct.

Morrell vs. Mackman, 24 Mich., 279.

In Dickerson vs. Colgrove, 100 U. S., 578, it is held that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

Argument.

Principles of Estoppel Applied in Cases of Invalid Statutes—Illinois Decision on the Statute in Question.

In a case in Michigan a wife learned that her husband had sold as his own a horse belonging to her, without her authority. She had ample time to inform the purchaser of her rights before he paid the purchase money but did not do so. She was held estopped to assert title to the horse even in an action at law.

Dann vs. Cudney, 13 Mich., 239.

Here the woman only kept silent. Wheelock, Clark and other defendants did everything in their power, by representations and conduct, to induce the purchase of the bonds for their benefit.

In Michigan it is settled law that "if by words or conduct one has intimated that he consents to an act which has been done and that he will not oppose it (although it could not have been lawfully done without his consent), and thereby induces others to do that from which they might have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of others who have given faith to his words or to the fair inference to be drawn from his conduct.

Truesdail vs. Ward, 24 Mich., 117.
Heyer vs. O'Hagen, 60 Mich., 150.

This general principle of estoppel has been frequently applied in cases of invalid acts of the Legislature, in cases similar to the one at bar.

In respect of this identical law and levee, the Supreme Court of Illinois, in Blake vs. The People, 109 Ill., 504, 521, fully recognize this principle, and declare the effect of the decision in the Webster case in accordance with it.

Argument.

Cases Enforcing Estoppel Against Pleading Unconstitutionality of a Statute.

Blake objected to the payment of an assessment levied by The Sny Island Levee Drainage Commissioners under the act of 1879, upon the ground that the Sny levee was not built under any law of the State of Illinois, because the Act of 1871 had been declared by the Supreme Court of Illinois to be unconstitutional. His contention was not sustained by the court, and the assessment was held valid.

We quote from the opinion of the Court:

"It is not accurate to say, merely because a law is repugnant to some provision of the constitution as in favor of particular rights, it is no law for any purpose. The respects wherein the act of April 24, 1871, was condemned as being unconstitutional were only as affecting those over whose lands the drains, levees, etc., were proposed to be constructed without the owners' consent, and those against whose property it was proposed to assess the costs of constructing such drains or levees without their consent. As to all other persons, and for all other purposes, the act was a valid law. As to those who were seeking to construct the drain, levee, etc., and who were promoters of the corporation, and to those who otherwise relinquished all right to interpose these objections to the validity of the law—as, for instance, those who gave the right of way for the drains and levees, and who voluntarily paid their special assessments—the law was not void. Cooley's Const. Lim. (1st ed.), 181; Baker vs. Braman, 6 Hill, 47; Embury vs. Connor, 3 N. Y. (3 Comst., 511). And precisely the same must be true as to whether the construction of the levee was in excess of the authority conferred by the statute. As to those who did not, in some proper way, give

their consent thereto, and whose property was proposed to be taken or damaged thereby, or to be charged with the expense thereof, the act of building the levee was not 'under any law of this State;' but as to those who built the levee upon their own land, or who voluntarily consented that others might build it there, and to those who voluntarily built it, and who voluntarily paid their assessments for that purpose, it was 'under the law of this State.' Except as against owners of land resisting the appropriation of their property to public use, or the damaging of it for that purpose, or resisting the enforcement of special assessments for the payment of the expenses of the construction of such levee, the 'Sny levee' was at all times entitled to the protection of law—and even as to those, their remedy was not to disregard all legal rights therein to others, but to enforce their own legal rights through the aid of courts" (p. 521).

In Daniels vs. Tierney, 102 U. S., 415, plaintiffs in error had given a bond to stay execution in a judgment against them under the provisions of an ordinance of the confederate State of Virginia. After the expiration of the time named in the ordinance (i. e., "when its operation ceased") plaintiffs in error were sued on the bond. They pleaded the invalidity of the bond because it was executed in pursuance of a statute of one of the confederate States, and was illegal and void.

The United States Supreme Court held:

1. That the ordinance was unconstitutional and void (p. 418); that the bond must be considered as an entirety, and

2. Declined to decide upon the validity of the bond as a common law bond, but treated it for the purposes of the decision as wholly void (p. 420).

3. That the obligors were liable upon the ground "that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit." "In such cases," the Court say, "the principle of estoppel applies with full force and effect." Citing cases, analyses of which I subjoin, and quoting with approval this language in Ferguson vs. Landrum, 5 Bush: "Upon what principle of exalted equality shall a man be permitted to receive a valuable consideration through a statute procured by his own consent or subsequently sanctioned by him or from which he derived an interest and consideration and then keep the consideration and repudiate the statute?" (p. 421, foot).

In Ferguson et al. vs. Landrum et al., 1 Bush, 548, complainants filed a bill to enjoin the levy of a tax to reimburse the county for a loan used to obtain volunteers for the federal army, and thereby save the citizens of the county from the operation of the draft. The Court held: the several acts which the Legislature had passed in the early part of 1865, authorizing the county courts for the Counties of Gallatin and Boone, respectively, to issue county bonds for the purpose of raising and paying money used and to be used, and expended in procuring volunteers and substitutes to fill the quota, or to exempt drafted men in said counties from service in the army of the United

States; and also authorizing said county courts, respectively, to levy and collect taxes to pay off said bonds *unconstitutional and invalid* as to those who did not participate in procuring the passage of said acts, and have never ratified them and have never received any benefit therefrom, but *the Court further say:* "We are equally clear that all those who were instrumental in the procurement of their passage or have acquiesced in and approved them, or have been the recipients of benefits under them, should not escape responsibility, and in equity and good conscience should be compelled to bear their proportion of the burden imposed by them."

"Before they escape from responsibility they must honestly return every cent which has been laid out and expended for their use and benefit."

And in a subsequent opinion in the same case reported in Ferguson vs. Landrum, 5 Bush, 230, the former decision of the court was adhered to, and the persons therein held responsible were held liable to the tax and as being estopped from denying the constitutionality of said enactment, and the court declared that, "In procuring the money and obtaining with it the volunteers, such parties violated no law of morality, or of the government; their contract was not void for want of consideration or illegality, *but it is the means* by which the sum for its reimbursement is to be raised that they assail. Parties are estopped from denying the constitutionality of a local statute by participating in the procurement of its passage, by ratifying, acquiescing in or approving it after its passage, and becoming recipients of benefits under it; and all such persons are held to be liable to the tax authorized by such

enactment, although it is unconstitutional and invalid as to all other persons," citing 4 Kent, Comstock's Ed., note 4, p. 261, 3 Hill, 219.

In Moran vs. Commissioners, 2 Black, 722, a county was held estopped to deny the validity of bonds issued by it which recited facts that would show them to have been regularly issued.

In City of Burlington vs. Gilbert, 31 Iowa, 356:

"where a city charter provided that the council should have power to cause to be opened, paved and improved any street or alley on the petition of not less than two-thirds of the abutting owners; it is *held* that a person who joined in such petition was thereby estopped from afterwards claiming that the assessment of a tax for the improvement petitioned for was unauthorized and illegal on the ground that two-thirds of the abutting owners did not join in the petition, 'While those who did not join in the petition might not be bound, those who did are.' "

Citing People vs. Goodwin, 1 Selden, 573.
Kellogg, Treas., etc., vs. Ely, 15 Ohio St., 66.

In People vs. Murray et al., 5 Hill, 468, a statute, after authorizing certain persons to erect a dam across a river provided that they should execute a bond to the people conditioned to pay such damages as each and every person might sustain from the erection of the dam; that any person conceiving himself aggrieved might apply to a county judge for the appointment of a justice of the peace *to inquire and ascertain whether* such person had sustained

damages by means of the dam; that the assessment of the justice should be signed by him and filed with the county clerk; that if the damages assessed were not paid within a specified time, the person entitled thereto might prosecute the bond; and that a certified copy of the assessment should be conclusive evidence of the amount of the damages. It was objected that if the certificate was held conclusive evidence of damage it took away the right of trial by jury, and the law would, therefore, be unconstitutional. *Held* in an action upon the bond, that the assessment was conclusive not only as to amount of damages, but also of the fact that they were caused by the erection of the dam.

"*Held* further, that the defendants, having acted under the statute by building the dam, were not at liberty to question the constitutionality of the provision relating to the mode of assessing damage." Nelson, C. J., says they "took the grant to build the dam with this condition (i. e. evidence of damage) attached to it; and they are not now at liberty to make the objection, though under other circumstances it might have been effectual."

In Van Hook et al. vs. Whitlock et al., 26 Wendell, 43, "where an act of incorporation of an insurance company contained a clause subjecting the stockholders of the company, at the time of its dissolution, individually to the payment of the debts of the company contracted before its dissolution, and the company had, in compliance with an act of the Legislature, assigned its property for the benefit of the creditors of the company (such act declaring that upon making such assignment the stockholders should be in no way liable for the demand of the creditors of the company), and the creditors received dividends under such assignments. It was held that though the act under which

the assignment was made was unconstitutional and void as to creditors whose demands existed previous to the passage of the act, still that the creditors having come in and accepted dividends under the assignment, were estopped and deprived of the right of calling upon the stockholders individually for the payment of the residue of their debts not received under the assignment," citing a number of cases.

In Motz et al. vs. City of Detr it 18 Mich., 495, Cooley, C. J., certain property owners before any contract had been entered into by the city for grading and paving a street joined in a petition to the Common Council to cause the street to be paved, the Council ordered the pavement as requested, the Court held the provision in the charter of the City of Detroit under which the paving assessments were to be assessed and collected by foot frontage void on the same grounds as Norwood vs. Baker, 172 U. S., but also held that these land owners who had petitioned for the improvement were estopped to attack its validity, saying: "Under these circumstances they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment and to have impliedly, at least, consented that such an assesment should be made," p. 528.

In Jackson vs. City of Detroit, 10 Mich., 248, "before certain paving (the assessment for which was in question) was done, an ordinance was submitted to the property owners, and accepted by them, whereby they were allowed to ornament and inclose a wide strip on each side of the street, and have the roadway paved or graveled within

eighteen months, according to the adopted plans and specifications for 1860, the year the contract was let. *Held,* in accepting this proposition the lot owners assented that the paving and sidewalk expenses might be assessed and collected under the ordinance and charter in the usual manner."

In Kellogg, Treas., etc., vs. Ely, 15 Ohio St., 64, where County Commissioners, acting on a petition of adjacent land owners, under a State statute, received bids, contracted for and had constructed a ditch; assessed amount necessary to pay for same against adjacent land owners, and caused the amounts to be placed on tax duplicates for collection, the defendant, who was so assessed, filed in the common pleas for his county a bill setting forth illegality of proceedings leading up to the assessments for the ditch, and praying for perpetual injunction to restrain the plaintiff in error, treasurer of the county, from collecting the assessments. The Court held that by his silence and inactivity during the construction of the ditch he was estopped from setting up such questions of illegality after his lands had been drained and he had received benefit from the ditch.

In Wiggin vs. Mayor et al. of N. Y., 9 Paige, 16, where an application for an injunction to restrain the collection of an assessment for widening, etc., a street in New York was based upon various illegalities and irregularities, on account of which complainant claimed that the Common Council had no jurisdiction to widen, etc., said street, after considering these questions, the Court say that the complainant, in waiting five years after improvements were commenced, and receiving the benefits of the im-

provements, will not be allowed to shift the payment on others, i. e., by a general tax, but is estopped.

In Chapman et al. vs. Mad River, etc., Ry., 6 Ohio St., 119, it was held that, conceding the Attorney-General has no power to authorize a corporation to embark in new enterprises beyond and outside the scope of its charter; yet it is clear that before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights as a stockholder. It will not do for him to wait till the mischief he complains of is accomplished, fortunes expended and great public interests created. If he do, he must be held to have acquiesced in the change.

In the matter of application of Edward Cooper, 93 N. Y., 507, Cooper joined in the proceedings to acquire lands for a public market in the City of New York by signing a petition asking for the appointment of a person named as one of the commissioners of estimate and assessment, who was appointed. The commissioners duly executed their office, appraising Cooper's lands among others. Cooper then moved to set aside the order appointing the commissioners beause of the unconstitutionality of the act and of non-compliance with certain statutory conditions.

Held, that he was estopped to raise these questions.

In Bidwell vs. City of Pittsburg, 85 Penn. St., 412, Bidwell was active in procuring an ordinance from the councils of Pittsburg directing the grading and paving of a certain street, was elected commissioner under the ordi-

nance charged with the superintendence of the improvement, sold city bonds and expended funds to defray the cost and made assessments in the mode prescribed by the ordinance upon the abutting property. The act of assembly, in accordance with which the ordinance was passed, was unconstitutional. Held, that Bidwell was estopped from denying the validity of the act of assembly.

The following cases are also to the same effect:

*Dewhurst vs. City of Allegheny, 95 Penn. St., 437, an action at law.

Ricketts vs. Sprasker, 77 Ind., 371.

*Tabor vs. Ferguson, 109 Ind., 227.

*State vs. Mitchell, 31 Ohio St., 592.

*City of Columbus vs. Sohl, 44 Ohio St., 479.

*City of Columbus vs. Sly, 44 Ohio St., 444.

*Muncey vs. Joest, 74 Ind., 409, a drainage case.

*Nervius vs. Otter Creek, etc., Co., 36 Ind., 189, action at law to recover a drainage assessment.

*Flora vs. Cline, 89 Ind., 208.

These decisions are not confined in their reasoning to the rule that equity will not relieve a complainant whose conduct has estopped him to ask relief in a court of equity. It would be utterly inconsistent with the broad spirit of equity jurisdiction if the rule of estoppel should depend for its exercise upon which side of the case the party estopped might happen to be.

In Daniels vs. Tierney, 102 U. S., 415; People vs, Murray, 5 Hill, 468, *ubi supra*, and the cases last above cited

which are marked with an asterisk, the estoppel was enforced against defendants in actions to recover assessments from them.

The opinion of the Circuit Court of Appeals states that "these authorities when carefully examined do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by this record. All who had any connection with the passage of the Act of 1871, or who desired its passage, acted as we may assume in good faith and in the firm belief that its provisions were not inconsistent with the Constitution of the State. It cannot be said that any one was guilty of fraud. No assurances of an affirmative character were given by the land owners to those who constructed the work, or to those who, like Palms, purchased the bonds after they were executed and delivered to the contractors."

"The land owners, the contractors, and the purchasers of bonds all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. It is a case of an honest mistake as to the competency of the legislature to do what it attempted to do, no one being misled by the assurances and representations of others."†

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†This statement is not accurate. Defendants Wheelock and the two other commissioners certified to Skelsey, Fuller and Pierce, the contractors, and to Pierce and Brower, financial agents, for use in selling the bonds in the printed pamphlet. (Record, pp. 385-393.) "There is no opposition to the improvement; but, on the contrary, it is unanimously demanded by the owners of the lands. (Record, pp. 389-390.)"

Argument.

Defendants are Estopped to Attack the Levee Law.

In respect to this portion of the opinion of the Court of Appeals, we beg leave to submit:

If the rule of estoppel applies there never was any legal obstacle to the imposition of special assessments to repair and maintain the levee. Again as a matter of fact, to execute act of May 29, 1879, passed by the Legislature, to execute the constitutional amendment of 1878, there was no legal obstacle to the imposition of special assessments to repair and maintain this levee. Very many of the defendant land owners, who had promoted the construction of the levee, availed themselves of the statute of 1879 and their right to do so was sustained in Blake vs. People, ubi supra.

When this act of 1879 was passed the levee was in the possession of defendant Wheelock and his fellow commissioners, not only as Sny Levee Drainage Commissioners, but also as receivers under the appointment by the U. S. Court in Palms' original suit. The land owners formed the new Sny Island Levee Drainage District *for the expressly stated and sole object of repairing* the original levee, and Wheelock and his colleagues surrendered possession of it to the new legally formed district, which has ever since kept and maintained and repaired it by means of assessments levied under the law of 1879.

The opinion of the Circuit Court of Appeals on this point is opposed to the decisions above cited. In each of the cases cited it could have been urged that the case was one of mutual mistake.

And it is in direct conflict with Bidwell vs. City of Pittsburgh, 85 Pa. St., 412, 418, where the Court say, pp. 417, 418: "The power (to take steps to improve a street) was called into action by the petitioners. They asked to have

the avenue brought under the operation of the act. They voluntarily asked for the privilege of becoming subject to all its provisions. They asked for the passage of the ordinance directing the work—for the assessment of their lands according to the frontage rule, in order to pay the bonds to be given to raise money to make the improvement. The authorities acceded to the request." * * *

They assumed the large additional indebtedness, relying upon the words and conduct of the petitioners. The latter declared they would submit themselves to all the charges and responsibilities imposed by that act. They wilfully caused the authorities to believe this as a matter of fact. So believing, the authorities acted upon it. They accepted the offer in the terms in which it was made. The petitioners directed the work. They received and enjoyed the benefits. To now permit them to deny the truth or the efficacy of the assurance given, and continued during the progress of the work, would work a fraud on the city which cannot be sanctioned."

"It is true every one is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled, not by expressive silence merely of the plaintiff in error, but by his decided and persistent action. It has been held that where a party has acted upon a particular

construction of a contract which has been acquiesced in by the other, the latter is estopped from contesting it as the proper construction. Mercer Mining and Manufacturing Co. vs. McKee, 17 P. F. Smith, 170."

"The constitutional right against unjust taxation, which the plaintiff in error invokes, is given him for the protection of his private property. He may waive that protection and consent to such action in regard to it as would otherwise be invalid. Having consented, and the other party having acted thereon, and made expenditures and incurred expense predicated thereon, the consent cannot be withdrawn."

In answer to a similar claim—of mutual mistake—the Supreme Court of Ohio say in State vs. Van Horne, 7 Ohio State, 327, 332: "The one" (the taxpayer) "was certainly as much bound to know (the law) as the other" (the bondholders) "and if both were mistaken no principle of law or justice would demand that the taxpayers should retain the fruits of the mistake, and at the same time repudiate those very acts of their own which misled the bondholders and induced them to part with their money; in truth blowing hot to get the bondholders' money and blowing cold to rid themselves of the obligation to refund it."

Granting the statement in the opinion of the Circuit Court of Appeals that "contrary to the expectations of all interested in them those proceedings were adjudged to be without the sanction of law." It does not take out of the rule the case of those defendant land owners who promoted and carried out the scheme for their own benefit and still retain its advantages. They obtained the money from Mr. Palms *to complete the levee by the second as-*

sessment under the same section of the act which authorized maintenance assessments, viz., Sec. 39, ubi sup., p. . .

"Any one or more new assessments may be made in the manner hereinbefore provided • • • either to supply any deficiency in any other assessment or t o r e p a i r, alter, or enlarge, cleanse, protect or maintain any drain, ditch, levee or other work constructed by virtue of this chapter."

Therefore it seems indisputable that if the principle of estoppel applies to any, it must apply to all the provisions of the statute. If the rule prevents the promoting defendant land-owners from alleging the unconstitutionality of the statute as to assessments *for constructing the levee,* it must prevent such an allegation against the assessments for *maintaining* the levee.

But such a distinction is not founded in justice and right between the parties.

The defendant land owners who were promoting the scheme did not ask the expenditure of money from contractors and others on the faith *of construction assessments which were not to be binding unless* the repair and maintenance assessments were held valid. They held out the entire statute as the inducement. They asked the money and work of others upon the faith *of all the provisions of the statute,* and by their conduct assured contractors and others, in the language of the opinion in Bidwell vs. City of Pittsburgh, *ubi sup., that they would not allege "any invalidity in the law which they were praying to have extended over them."*

The position that the bond owners could only rely on construction assessments in case the maintenance assessments were valid overlooks the self-evident fact that no

business man of ordinary prudence would have ever advanced money on the bonds unless he believed the levee was intended to be maintained. What would be left of the security—i. e., the assessments on the lands—if there were no means of continuing the protection of the levee over the lands and they returned to their former state?

Moreover, the land owners and the bondholders do not stand on the same ground. The bondholders originally were indifferent to the building of the levee; they owned no lands which it would protect. The land owners interested them in the matter as solely a money investment, they offered the inducement of a liberal discount and rate of interest for their money upon a loan secured, by liens through the assessments, on lands which the levee would reclaim and make valuable. The bondholders were investors; the land owners were promoters. As promoters they asked the bondholders for a loan of money in order to construct a levee to protect their lands. The latter could not be presumed to expect the former would ever attempt to repudiate the law which they held out to them as valid, or that a court of equity would allow them to do so.

CLASSES OF DEFENDANTS WHO ARE ESTOPPED AND PURCHASERS WITH NOTICE.

If these principles of estoppel are applied in this cause, the first general class of assessments, i. e., those upon lands belonging to defendants who are estopped by conduct previous to the purchase by complainants' testator of the bonds issued by the levee commissioners in payment of the expense and cost of the location and construction of the levee, may be devided as follows:

Assessments against the lands—

(1) Of defendants, who procured the passage of the act of the Legislature under which the county court of Pike

county and the commissioners appointed thereby, acted and built the levee and asked for and received the complainants' money.

The allegation that some of the defendants procured the passage of the Act of 1871 is said not to be appropriate. This criticism is based upon a misapprehension of the intended, if not actual, significance of the verb. The context clearly shows that there was no intention of questioning the motives of the Legislature in passing the act in question. Such an allegation would be not only inappropriate but manifestly improper.

> Fletcher vs. Peck, 6 Cranch., 87, 130.
> Warner vs. New Orleans, 175 U. S., 120.

But it is obvious that the Legislature of Illinois cannot of their own knowledge be aware of all the local needs in every part of the state. Some one must bring these to their attention and request appropriate legislation.

The case at bar furnishes an apt illustration: Defendant A. C. Mathews introduced in the Illinois Legislature the resolution for the amendment to the Constitution in respect of levees; and also the Act of May, 1879. It does not seem either improper or inappropriate to say he procured their passage; not because the Legislature did not act upon their own judgment as to what was proper to be done, but because he called their attention to the facts of the siutation and the needed remedy. It is a very common practice to petition and memorialize a Legislature in matters of local concerns as well as general policy. It is admitted in the briefs of opposing counsel that the act of 1871, the constitutional amendment of 1878 and the act of 1879 were enacted "through the instrumentality of the land owners.

(2) Of defendants who subscribed to the stock of the Mississippi Levee Drainage Company, organized for the *purpose of giving effect to the act of April 24, 1871, and* to raise sufficient money to do the necessary work prior to the steps taken by the county court for Pike County.

(3) Of defendants who petitioned the Pike County court to exercise jurisdiction and order the construction of the levee and the making of an assessment to pay for the same.

(4) Of defendants who voluntarily paid interest for the years 1873 and 1874 upon the assessments levied against their lands, and thereby gave credit to the original assessments and bonds issued thereunder, so that the complainants' testator was induced to purchase not only the bonds first issued but all of the bonds issued upon the faith of the second assessment.

(5) Of defendants who petitioned for the second assessment.

(6) Of defendants who had notice of the petitions for the first and second assessments, and did not object to the same, and all persons against whose lands the assessment were confirmed by the county court of Pike County.

(7) Of defendants whose lands were benefited by the building of the levee, and who offered no objection, but stood by and saw the levee built for their benefit with knowledge that it was being paid for out of moneys raised from the sale of bonds issued on the faith of levee assessments.

And the second general class, i. e., assessments on lands belonging to defendants, who by acts of appropriation of the levee and ratification of acts of others appropriating it, with full knowledge of the benefits to be had from it,

have and still are receiving the benefit of its protection to their lands, and that it was built with the money of the bondholders, may be divided as follows:

Assessments against the lands—

(1) Of defendants who joined in the trust deeds to the commissioners after the decree of March, 1879.

(2) Of defendants who formed the Sny Island Levee Drainage District, through it appropriated the levee to their own use and benefit, and without objection paid the assessments, or any of them, made by said district for its maintenance and repair.

These classes include assessments on lands of persons who were owners of the lands at the time, the various acts charged as acts of estoppel, were done either by themselves or by persons having their express or implied prior authority or subsequent ratification.

There are also assessment on lands to which many defendants have acquired title since the proceedings and acts and conduct which are charged as an estoppel upon the the then land owners:

1. The lands of those defendants who have acquired title since the filing of the petition for the first assessment in August, 1871, with knowledge of the proceedings thereunder.

2. The lands of those who acquired title subsequent to the filing of the petition for the second assessment in 1874, with knowledge of the proceedings thereunder.

3. The lands of those who have purchased any lands included in the trust deeds of January and March, 1877.

Argument.

Purchasers with Notice.

4. The lands of those who have acquired title from parties who joined in the trust deeds to the commissioners, with knowledge or notice of those deeds, and that the lands which they purchased of such parties were benefited by the levee.

5. The lands of those who acquired title from persons who formed the Sny Island Levee Drainage District and filed a petition praying for creation of the same.

6. The lands of those who acquired title from persons who were notified of the formation of such district and did not object thereto, but acquiesced therein and received the benefits thereof.

7. The lands of those defendants who have acquired their title from persons who, without objection, paid assessments therein made by said district, or against which lands such assessments were confirmed by the Pike County court.

8. The lands of those defendants who have taken title by deeds which were made subject to, or referred to the first and second assessments, or either of them, or in whose chain of title there are any such deeds.

9. The lands of those defendants who are heirs or devisees of any of the persons named in the previous classes.

10. The lands of those defendants who acquired their title subsequent to the decree of this court in March, 1879, and thereby are charged with notice of all the proceedings set up in the original bill, which is the foundation of this bill.

11. The lands of those defendants who have taken title to any of the lands upon which assessments were levied

subsequent to the decree of this court, of July, 1880, and thereby charged with notice of all the proceedings had in said cause and of the lien of the complainants upon the assessments and upon said lands.

SUBSEQUENT PURCHASERS WITH NOTICE.

If the assessments on the lands of the above described defendants are valid, it follows logically that the assessments on lands benefitted by the levee and now held by defendants who purchased with notice from persons who found with the foregoing defendants in the several acts of estoppel above stated must be sustained.

Such assessments embrace those upon the lands of

(1) Defendants who have taken title by deed which were made subject to or refer to such assessments or in whose chain of title there are such deeds.

(2) Purchasers with notice of lands upon which there were levee assessments, after the filing of the petition for the first assessments in August, 1871.

(3) Purchasers with notice of lands upon which there were levee assessments, after the filing of the second petition.

(4) Purchasers of lands, which were included in the trust deeds to the commissioners upon which there are levee assessments.

(5) Purchasers of lands upon which there are levee assessments, from grantors in the trust deeds to the commissioners with knowledge or notice of that fact and that the lands which they purchased were benefited by the levee.

Argument.

Subsequent Purchasers with Notice.

(6) Purchasers with notice of lands on which there are levee assessments, from the persons who formed the Sny Island Levee Drainage District and filed a petition, praying for the creation of the same.

(7) Purchasers with notice of lands on which there are levee assessments, from persons duly notified of the proceedings for the formation of such district.

(8) Purchasers with notice of lands on which there are levee assessments from persons who without objection paid assessments made by said district.

(9) The heirs or devisees of any of the persons named

All of these persons will, of course, be bound by a notice of these assessments if the court shall hold the levee law constitutional. For it is expressly provided by the act that such registry shall be notice. Sec. 28, Drainage Law. (Record, p. 400.)

We will discuss under this head of the brief only the question of notice either by the record of the deeds or assessments or actual knowledge, leaving the question of *lis pendens* to be discussed separately. As affected by notice will be the defendants in classes first to eighth, inclusive.

If the Court holds the act to be unconstitutional, but that certain of the land owners, by reason of their conduct or acts *in pais*, are estopped to question its constitutionality, then we submit that purchasers from all said persons are put upon inquiry by the record of such assessments which appears in their chain of title, and it is their duty to make reasonable effort to ascertain the facts. If by such effort they might have learned facts which would make the assessments a valid lien upon the lands as against their grantor by reason of an estoppel, then they are chargeable with notice of those facts.

DEFENDANTS WHO HAVE ACQUIRED TITLE THROUGH DEEDS MADE SUBJECT TO OR REFERRING TO SUCH ASSESSMENTS.

The first class are persons who have acquired title by deeds which were made subject to or referred to such assessments.

There can be no doubt but that all such defendants are purchasers with notice, and stand in like predicament with their grantors. If the assessments entered into the consideration to be paid for the lands, and especially if in the deeds they assumed the payment of the assessments, they could not now dispute the validity of the same. Their case is like that of a person buying a piece of real estate subject to the payment of the mortgage thereon. While unless he expressly assumes and promises to pay the mortgage, he may not be personally liable, yet he will not be allowed to assert that the mortgage is for any reason invalid, or to deny that it is a lien upon the land.

Dickinson vs. Worthington, 10 Fed. Rep., 860.
Cordova vs. Hood, 17 Wallace, 1.

Lovejoy vs. Raymond, 58 Vermont, 509.

Even if the deeds only refer to these assessments and are not made subject to them, or have no words indicating that the price received by the grantor was affected by the existence of the assessments, still the reference to the assessments in the deeds is notice to the purchaser of the existence of the assessment, and he buys at his peril. If it is made to appear that any of his grantors were in such situation as respects these assessments that they were binding upon them and valid as to their lands, then they

are equally binding upon the purchaser and equally valid against his title to the lands.

Lovejoy vs. Raymond, supra.

In Case vs. Erwin, 18 Mich., 434, it was stated in the mortgage that the property was owned by the mortgagors and "Catlin and Erwin."

Held, that the mortgage bore on its face enough to indicate that Catlin & Erwin had claims in or to the property, and also to indicate that whatever was conveyed by it, and whether subordinate or not to these rights was to be ascertained by inquiry; that Goodrich, the mortgagee, was, therefore, chargeable with equities of Catlin & Erwin and bound by them, and that Jennings, who held only under the mortgage, was in like position.

In Norris vs. Hill, 1 Mich., 202, N. & M. divided land owned in common by them, and executed releases to each other. Green, J., says, "The releases must be taken and construed as one instrument in the light of all the surrounding circumstances to which they obviously point; for by such circumstances not only the parties to the deeds, but all parties claiming under them, are bound, it being a general rule of law and equity that 'when a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.'"

To the same effect, Fitzhugh vs. Barnard, 12 Mich., 104.

In American Emigrant Co. vs. Call et al., 22 Fed. Repr., 765, Call and the American Emigrant Co. owned certain interests in swamp lands, and C. entered into a certain agreement with the company which was, in effect, a conveyance of his interest, which agreement was recorded

and indexed. Court hold that the indexing as made was sufficient to put an examiner on inquiry. C. afterwards conveyed to S.

By the Court: "Having knowledge, either actual or constructive, of the facts recited in the agreement between his (S.'s) grantor and the complainant, he was, therefore, put upon inquiry in order to ascertain the real facts. He was not compelled to purchase the lands, but when about to do so he was charged with the duty of making proper examination touching the rights and equities of others when the record showed that others had such rights in the lands he was about to purchase. (3 Washburn, Real Prop., p. 328.)

In Campbell vs. Indianapolis and V. R. Co., 11 N. E. Rep., 482, the railway company took possession of a certain strip of land for its right of way under a parol license from the owner, Campbell; claimants under that owner brought action to recover possession of the strip. Howk, J., delivered the opinion of the court, holding that where a parol license of a right of way has been given, upon the faith of which moneys have been expended, the licensor *and those claiming under him with notice* will be estopped from revoking the license if the licensee cannot be placed in *statu quo.*

And further, "In the case in hand, the occupancy and use of the strip of land in controversy for appellees' roadbed and railroad track, and for the running of its trains, was sufficient notice to appellant, who claims under the original licensor, of appellees' equity; for that which shall be sufficient to put the party upon inquiry is notice." (Hiern vs. Mill, 13 Ves., 120; Singer vs. Scheible, 10 N. E. Rep., 616.)

Argument.

Subsequent Purchasers with Notice.

It was held by the Lord Chancellor in Mertins vs. Joliffe, 1 Amb., 314, where a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact, "for it is *crassa negligentia* that he sought not after it." To the same effect

Ferrars vs. Cherry, 2 Vern., 384.
Moor vs. Bennett, 2 Chas. Cas.

In Dickenson vs. Worthington, 10 Fed. Rep., 860, where the trustee was authorized by the court to make a sale of certain land and simultaneously invest the purchase money in a mortgage in the same land, and he sold the land under order of the Court, but received no consideration and no mortgage was ever given, the trustee had no authority without a further order of the Court to afterwards receive the purchase money in cash, or make a deed for the land; and the proceedings of the court ordering the sale and the investment of the purchase money were sufficient to put anyone dealing with the property upon inquiry as to why the mortgage had not been given. The lien for the purchase money was not lost by the execution of the deed by the trustee.

In Cordova vs. Hood, 17 Wallace, p. 1, where a deed of land shows on its face that the consideration is yet to be paid, a second purchaser (that is to say, a purchaser from the vendee), who has notice of the deed, takes the land in those States where the English chancery doctrine of a vendor's lien prevails, subject to the vendor's lien, unless such lien has been in some way waived.

In the case of such a deed, it is the duty of the new purchaser to inquire; and where inquiry is a duty the party bound to make inquiry is bound with all the knowledge which he would have got had he inquired.

Argument.

Subsequent Purchasers with Notice.

In Humphreys vs. Gardner, 11 Johns., 61, Ross let a house to Humphreys and Gardner claimed the right to receive rent for same. It was agreed by R. & G. to submit question to arbitrators, H. meantime took possession of premises. Both R. & G. had notice of the decision, but it does not appear that actual notice was given to H. The action was to compel H. to pay rent. It was held that H. was bound to take notice of the award at his peril, he being privy to the submission and assenting to it and entering into the possession of the premises at the time, with knowledge of the submission of the parties claiming the rent.

And these considerations apply with equal force whether the present defendant holds his title directly from the party upon whose lands, by reason of his conduct or other facts, the assessments are binding, or whether such deed is more remote in his chain of title. A purchaser is chargeable with notice of everything that appears in his chain of title.

Mertins vs. Joliffe, 1 Amber, 314.
Hiern vs. Mill, 13 Ves., 120.
Bush vs. Ware, 15 Peters, 93.
Hazlett vs. Sinclair, 76 Ind., 488.
Hazlett vs. Sinclair, 84 Ind., 594.
Hazlett vs. Sinclair, 20 Ind., 40.

This notice puts them upon inquiry. Such inquiry is not sufficient if it stops with the mere ascertaining that the Supreme Court of Illinois has declared that the drainage law is unconstitutional. If they stop here they rest upon their own responsibility. It is their duty to go further and ascertain if any facts existed which, notwith-

standing the decision of the Supreme Court of the State of Illinois, made the assessments a valid lien upon the lands they purchased. If any such facts are shown to exist, then they hold their lands subject to such assessments.

Norris vs. Hill, 1 Mich., 202.
Fitzhugh vs. Barnard, 12 Mich., 104.
Campbell vs. Indianapolis & V. R. Co., 11 N. E. Rep., 482.
Singer vs. Scheible, 10 N. E. Rep., 616.
Hazlett vs. Sinclair, 76 Ind., 488.

In Bush vs. Ware, 5 Peters, 93, there was in question the title to lands, and the *defect* was in the government patent, which was issued to one party, while the right to it was in another. It was claimed that the defendant was a bona fide purchaser for value, having no knowledge of irregularity of issuing of patent.

The Court say, p. 111: "The question is not whether the defendant in fact saw any of the muniments of title, but whether or not he was not bound to see them. It will not do for a purchaser to close his eyes to facts which are open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected." * * * "The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such a defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced through his negligence?"

Argument.

Subsequent Purchasers with Notice.

No principle is better established than that a purchaser must look to every part of his title.

In Lovejoy vs. Raymond, 58 Vermont, 509, it was held that the devise of the residue of an estate upon condition that certain legacies be paid by the residuary legatees will, upon their acceptance of the devise, charge the real estate so devised with an equitable lien for the payment of such legacies.

Subsequent purchasers, without actual notice, of real estate charged with the payment of such legacies, where their own deeds referred to others in the chain of title which mention such charge, were held to take with constructive notice, because of such reference, although the will was not recorded in the town where the land is situated.

Speaking of such purchasers the Court said: "The circumstances under which the last named defendants purchased the property were such as to put them upon inquiry as to the state of the title, and the law will impute to them such knowledge as they would or might have acquired by making such inquiry." The "circumstances" here referred to were references in deeds to town and probate records for descriptions of the property describing the interest as acquired from the estate.

This will also include all defendants who purchased lands described in the trust deeds of March, 1879. These deeds were on record. The trustees therein named were expressly described as Commissioners appointed under the act of April 24, 1871. It will also include all purchasers from parties joining in the trust deeds of lands, upon which there were levee assessments, although not included in the trust deeds, if at the time they purchased of their

grantors they had knowledge or notice either actual or constructive of this fact and that the lands purchased by them of such parties were benefited by the levee.

LIS PENDENS AND CONSTRUCTIVE NOTICE.

Whether the original bill by Mr. Palms against the Commissioners, to which this bill is supplemental and in review, operated as a technical lis pendens or not may be questionable. The fact that the landowners who were promoting the levee were in possession of the levee through their trustees—the Commissioners; and their names and lands and the assessments thereon were listed in detail in the bound book, Exhibit "A," attached to the bill of complaint, and that the relief prayed in the bill was the enforcement and collection of the special assessments would seem to warrant the claim.

Whiteside vs. Hazelton, 110 U. S., 206.
Stevens vs. The Railroads, 4 Fed., 97.

However this may be, we submit with confidence that the filing of that bill and the attendant circumstances are strong evidence of notice to all purchasers of any of said lands. The commissioners were in possession of and repairing and maintaining the levee as the agents of these landowners, who were promoting the construction of the levee. The character of the levee—a great public work, fifty-two miles in length, averaging eight feet in height, standing between the Mississippi River and one hundred and ten thousand acres of the finest land in the State and protecting it from overflow, constructed under the public act of the State legislature—could not fail to attract the

attention of every one in its locality to its existence and its protection of and benefit to the lands behind it. Certainly no one could purchase any of the lands protected by it without noticing it and understanding its purpose; neither could anyone purchase, with proper inquiry, any of the lands protected by it without learning the measures taken for its construction and without notice of the interest of each landowner in the levee, and his corresponding right and duty to pay his assessment for the cost thereof, and to see to its repair and maintenance through the levee commissioners, who were in possession of it in the interest and as agents of the land owners.

The ninth class, namely, the heirs or devisees of persons who while living were chargeable with notice, of course take only the rights of these under or through whom they claim as heirs or devisees.

ANSWER TO CLAIM OF DEFENCE BECAUSE OF LOCATION AND CONSTRUCTION OF LEVEE.

The Circuit Court of Appeals, in its opinion, say:

"There was evidence tending to show—indeed, we think the weight of evidence was—that the levee built under the Act of 1871 was not adequately constructed."

We do not understand the decision is placed on this ground, but it is proper to call it to the attention of this Honorable Court. No such finding was made by the Circuit Court for the Southern District of Illinois.

If by this is meant that there were breaks in the levee and that the levee at times did not withstand the resistless power of the Mississippi River, we respectfully submit it is no defence to complainants' claims.

Argument.

Answer to Claim of Defence Because of Location and Construction of Levee.

Surely, the contractors never guaranteed an indestructible levee. They were not insurers. *A fortiori*, the bondholders, even if they claimed under the contractors, did not. But they do not claim through or under the contractors. They claim under section 35. This is clearly shown hereafter (p. 87).

If this statement in the opinion means that the levee was not constructed and completed according to contract, the evidence is overwhelming that it was accepted as such by the commissioners and their chief engineer, and the commissioners took possession of it in 1875.

Corthell, Chief Engineer (Rec., p. 365).

Parkhurst Assistant Engineer (Rec., p. 351).

Defendant Jones, Commissioner (Rec., p. 71).

The present solid and stable condition of the levee, with a record of but one break in twenty-one years, is a conclusive answer to the claim of defendants that the levee was wholly inadequate.

But it is no fault of the bondholders that the protection to the lands which the levee has given so many years and still affords has at times been interrupted by breaks in the levee. Some, if not all, of them were due to want of proper care of the levee.

The bondholders had no voice in choosing its location or determining its dimensions or prescribing the manner in which it should be built, or any right to repair or protect it when completed. All questions of location and construction the land owners, through agents of their choice, had decided before the bondholders were asked to lend their money. The latter bought the bonds in good

faith, believing that the land owners had wisely planned and were properly constructing a protective levee. The commissioners' agreement with the contractors made the land owners' chief engineer the final and supreme arbiter of those questions. They assumed, as they were warranted in doing, that the land owners, through their commissioners, had wisely located and would properly construct, care for, repair and maintain the levee. Under these circumstances, upon what conceivable ground can the bondholders be held responsible for any breaks in the levee?

The contract between Wheelock, Jones and Dustin, Commissioners, provided, among other things, "that said parties of the first part, in consideration "of the promises of said levee commissioners hereinafter set forth, agree to construct and finish the proposed levee of the commissioners in accordance with the specifications now on file in the County Court of Pike County, Illinois, and with the instructions, from time to time, of the chief engineer of said levee commissioners and to his entire satisfaction and approval." Said levee is to be located according to the above general description by the chief engineer of said levee commission. (Record, pp. 366, 369.)

After and in consideration of the work to be done by the parties of the first part, the said levee commissioners agreed to pay them as follows: "The work to be paid for in the bonds issued by said levee commissioners at a valuation of ninety per cent of their par value, payments to be made on or before the tenth day of each month, * * * and to be made on estimates furnished by the chief engineer of said levee commissioners, reserving, however, ten per cent of each monthly estimate from each monthly

payment until the final and satisfactory completion of the work in this contract, when a final estimate will be made by the chief engineer, which shall be conclusive on the parties to this contract; and upon the making of such final estimate, the balance appearing due to the said party of the first part shall be paid." * * * "It is further agreed, in case of any disagreement or difference of opinion between the parties hereto as to the true intent and meaning of the contract, the matter shall be referred to the chief engineer of said levee commissioners, and his opinion shall be binding on all the parties to this contract." (Record, pp. 366-367.)

An inspection of this entire contract is invited. It will show how carefully it was drawn to protect the commissioners and the persons whom they represented against any default or deficiency in the performance of the contractors' agreement. As I understand it is settled law, I cite only a few out of many authorities that under a contract like this there cannot be any appeal from, or review of, the decision of the chief engineer, except on clear proof of fraud, of which there is not a scintilla in this case.

Savercool vs. Farwell, 17 Mich., 308.

Railroad Co. vs. March, 114 U. S., 549.

Shipman vs. District of Columbia, 119 U. S., 148.

Chicago, S. F. & C. R. Co. vs. Price, 138 U. S., 185.

Sheffield & B. Coal, I. & R. Co. vs. Gordon, 151 U. S., 285.

Reply to Claim of Defence Because of Location and Construction of Levee—Complainants do not Claim in Subrogation of Contractors.

Also a few out of many authorities that in a contract like the one at bar the ninety per cent to be paid on the monthly estimates becomes absolutely and unqualifiedly due the contractor at the time named in the contract, regardless of the fact or time of final completion of the contract.

Strauss vs. The Railroad Co., 7 W. Va., 368.
Baltimore & Ohio R. R. vs. Gallahaus, Admr., 14 Grattan, 563.
Hennessy vs. Farrell, 4 Cush., 267.

The ingenuity of the able counsel for defendants lead the Court of Appeals to consider the complainants' claim as one of subrogation to the rights of the contractors.

The bondholders do not claim under the contractors, but under their bonds, which by the provisions of Section 35 of the statute carry a lien on the assessments. There is not a word in the act or in the contract which gives the contractors any such lien, except through the bonds which they recover as their pay for work done and accepted by the chief engineer. The act is particularly careful not to do so.

Sec. 35. "The commissioners may borrow money, not exceeding in amount of assessments unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally

liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

Therefore, when the bonds signed and issued by the commissioners, were purchased by the public all questions as to the character or sufficiency of the construction of the levee had been conclusively and finally decided, and cannot now be set up as a defense to the assessments.

Reply to Claim of Defence of Laches.

Neither the opinion of the Circuit Court nor of the Court of Appeals puts the decision of the case upon the ground of laches of complainants or their testator, but the opinion of the Court of Appeals contains this language:

"He (Mr. Palms) was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000.00 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a court of equity ought to decline giving them any relief." * * *

We beg leave, with the utmost deference to the learned Circuit Court of Appeals, to call attention to some inaccuracies in this statement.

The statement that Mr. Palms "was given leave to file such a bill" (viz: a supplemental bill to bring the land

owners before the court) "by an order entered in 1879," is not correct. The decree of 1879 (Record, pp. 437, 438) did so state, but referred it to a master to ascertain the amounts due to the complainants and other persons, as holders of bonds issued by the defendants * * * to pay for the construction of said levee, and ordered that after "the coming in of the master's report of the amount or amounts found by him to be due the complainants or other persons who may come into the cause as aforesaid, and the approval of the said report, * * * the said complainants have the liberty to exhibit and file their supplemental bill or bills against any or all the present or former owners of the said land alleged in said bill to be benefited by the said levee."

The master's report was not filed until July 7th, 1880, and the definite and authoritative leave to Mr. Palms and others to file a supplemental bill for the recovery of the amounts found due them by the master was not granted until July 7th, 1880 (Record, pp. 439 to 441), and this order of leave was limited to the amounts found due by the master, which at that time included only the accrued interest.

The opinion also states: "But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed."

Whereas the record shows: That at the date of this decree nothing but interest had accrued; that no assessments fell due until October, 1883; that none of the Palms bonds matured until July, 1883, when only

$28,000 fell due; and that at his death, November 24th, 1886, only $58,000 had matured, $13,000 of this amount falling due within only a few months before his death. (Record, pp. 21, 22, 273.)

In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners through the new levee drainage district organization were spending money in repairing, and it would have been unreasonable for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due.

His executors were appointed in 1887 and filed this bill in April, 1889. When the great amount of detailed examination of the titles to the lands in Exhibit "A" and the time necessary to have prepared the needed abstracts is considered, they proceeded with unusual speed. Their bill was filed a little more than two years after their appointment; before their entire claim had matured; less than six years after the earliest maturing bonds of the issue of 1872 fell due, *and three years before any of the bonds of the issue of 1875 had matured.* The earliest maturing bonds of this series did not become due until 1892. The Illinois statute of limitations, cited in the opinion, had not run against any one of Mr. Palms' bonds when the bill was filed.

Again, during the period between the decree of 1880 and the filing of the bill, no such changes in the title of the lands have occurred that defendants will suffer any injury if assessments are now enforced.

If any persons have purchased without notice of complainants' rights to enforce the assessments, then their lands go free. If they purchased with notice they did so at

their peril. All acts of estoppel necessarily must be proven by matters of record, or facts of general notoriety.

THE OBJECT OF THE BILL IS NOT TO COLLECT A TAX AND THE COMPLAINANT'S REMEDY IS IN EQUITY.

It is claimed that the object of the bill is to collect a tax; that such a purpose is not the subject of equity jurisdiction, and that the remedy of such complainants is at law and not in equity. It is too plain to need argument that the object of the bill is to enforce specific assessments on specific lands for specific benefits. It seems scarcely necessary in respect to this objection to do more than cite a few of the numerous decisions which recognize and declare that assessments are not taxes and point out the distinction between them. In the City of ttawa vs. the Trustees of the Free Church, 20 Illinois, 423, it is decided that church property, although not liable for ordinary taxes, may be assessed for special purposes. In Bride vs. City of Chicago, 22 Illinois, 573, and City of Peoria vs. Kidder, 25 Ills., 351, the Supreme Court says: "In reference to an assessment imposed for the purpose of widening streets a levy of that character is held not to be a tax, although in many respects similar." In Canal Trustees of Illinois and Michigan Canal, 12 Ills., 405, the real estate of the corporation was "exempted from taxation of every description by and under the laws of this State." Held, that the exemption did not cover a street opening assessment. The Court say: "A tax is imposed for some general or public object, it is an action made for the purpose of carrying on the government directly or through the medium of municipal corporations, which are but parts of the machinery em-

ployed in conducting the operations of the government. It is a charge on an estate that lessens its value."

The decisions in the State of New York are to the same effect, in the matter of the Mayor of New York, 11 Johnson, 77; Bleaker vs. Ballon, 3 Wend., 263; and in Pennsylvania, The Northern Liberties vs. St. John's Church, 13 Penn. St., 104; and in Ohio, 8 Ohio St. Rep., 333, is a very strong decision upon this question and as to the extended power of the legislature as to assessments.

The following decisions of the Supreme Court of the United States which are relied upon for this claim of defense are easily distinguishable:

In Wakely vs. City of Muscatine, 6 Wall., 481, an attempt was made by proceedings in chancery to compel the city to collect a tax wherewith to meet certain bonds, the validity of the bonds was not questioned, but the Court held the remedy was at law by a writ of mandamus.

Supervisors vs. Rogers, 7 Wall., 175.

The proceeding was by mandamus under a special law authorizing the courts to issue such writs to appoint a person to do the act ordered to be done, and under this provision the taxes were collected by the appointee of the Federal Court.

The case is explained in

Reese vs. City of Watertown, 9 Wall., 107.

Thompson vs. Allen, 115 U. S., 550, collects and reviews all the authorities.

But there is no analogy between these decisions and the case at bar. Here there is no question of levying and assessing a tax and then collecting it. In such a case the

creditor or party to be benefited by the collection of a tax has no lien which he can enforce, as is said by the Supreme Court of the United States in Berkley vs. Levee Commissioners, 93 U. S., 264, "Liens for taxes are very generally created throughout the country, but it is never supposed that the public creditors to whom the money raised by tax is to be paid have the benefit of such lien. It is created for the benefit of the public authorities to enable them with greater certainty and facility to collect the tax without the embarrassment of other claims against the property taxed." The radical difference between such a case and the present one where specific liens are given upon specific lands under a statute which declares that the "notes or bonds" * * * (given to raise means to construct the levee) "shall constitute a lien upon the assessments for the repayment of the principal and interest thereof, and that such assessment * * * shall be a lien upon the lands assessed until paid" is too obvious to need elaboration.

If the Act of 1871 is constitutional the levee commissioners were trustees for the bondholders to collect all the special assessments and with the proceeds pay the bonds. If the act was unconstitutional the commissioners' duty was to collect the assessments on the lands of those who were estopped to claim this defence. The power of a court of equity to compel them to do their duty as trustees certainly cannot be questioned. But a court of equity is not compelled to act throuh a delinquent trustee, especially when there is collusion between the trustee and the persons indebted to his *cestuis que trustent*. It will give the relief directly whenever the nature of the case will permit it. This is such a case. The entire relief prayed may be obtained by a decree in the nature of a decree of foreclosure

and the usual sale by a master in pursuance thereof. This was the conclusion of Judge Drummond in granting the decretal orders of 1879 and 1880.

Neither is there any practical difficulty in carrying out the decree of the Court. The manner of giving relief is as simple as the foreclosing of a mortgage, which it entirely resembles. The Court directly, or through a master, will find the amounts of the several assessments on the several parcels of land and make a decree that if the several assessments are not paid by a certain day a master shall sell the lands as he would sell a parcel of land upon a foreclosure of a mortgage.

Fitch vs. Creighton, 24 How., 159, was precisely such a case. The Court enforced the lien of certain assessments for work on the streets against adjoining lot owners by directing a sale in default of payment within ten days, although the statute of the State provided a specific mode of enforcing the lien, holding that where a statute of a State gives a lien for work on the streets against the adjoining lot owner, though it may give a specific mode of enforcing that lien, a court of the United States will enforce such lien in a court of equity as the one appropriate to its jurisdiction.

Hagar vs. Reclamation District, 111 U. S., 701, is also on all fours with the case at bar. It was a suit by Supervisors of the District to obtain a decree that the assessments for reclamation works were liens upon the lands of the appellants and for their sale to satisfy charges. The case was removed to the United States Circuit Court and the decree of that court that the several sums assessed were valid liens upon the lands of the appellant on which they were levied and ordering the lands to be sold for payment of the amounts with interest and costs was affirmed by the Supreme Court of the United States.

Argument.

Tax Titles are no Defense.

THE ALLEGED TAX TITLES HELD BY THE SNY ISLAND LEVEE DRAINAGE COMMISSION.

Another claim of defense is: That a large portion of the lands on which complainants claim a lien were sold for State and county taxes, and purchased by the Sny Island Levee Drainage District, and deeds have been issued, and the district holds under them a superior title to the claim or right of complainants or any other person.

When it is borne in mind that this Sny Island Levee Drainage District was organized for the *sole purpose of repairing* the levee which the money of the bondholders constructed, this seems a strange claim to put forth in a court of equity! ! !

They first, without any right, appropriate the levee which the bondholders' money has built, and then buy up tax titles on the lands benefited by the levee for the purpose of cutting off the lien of the bondholders! !

There are several conclusive answers to this claim:

1st. The new district took possession of the old levee to repair and maintain it, and its rights and powers in the premises are in continuation of and subordinate to the original construction levee assessments. If there is any duty imposed on the new district to pay State and county taxes on lands protected by the levee, then it cannot thereby obtain any rights or liens upon these lands by letting the taxes go to sale and purchasing at such sale. It is settled law that a party whose duty it is to pay a tax cannot cut off another's right to whom he owes any duty or to which right his own claim is subordinate by allowing the land to be sold for taxes and bidding it in either in his own name or in the name of some other person for him.

Dubois vs. Campau, 24 M., 260, at p. 368: "It may be re-

garded as settled that one in possession of land, claiming it as his own, is bound to pay the taxes imposed upon it—certainly such as are imposed and become due during such possession; and that, by neglecting this duty, suffering the land to be sold for taxes, and bidding it in himself, he can acquire no title against anyone, such sale being based upon his own fault."

Lacey vs. Davis, 4 Mich., 140.
Whitney et al. vs. Gunderson, 31 Wis., 359.
Miller vs. Ziegler, 31 Kan., 417.

Bassett vs. Welch, 22 Wis., 176: One in possession when taxes accrued, and against whom they are assessed (taxes being assessable against the occupant), can acquire no title under a sale for such taxes.

This doctrine is especially applied to cases of mortgagors and purchasers of lands subject to mortgage.

Seppo vs. Gilbert, 26 Kan., 139: One who purchases real estate subject to a mortgage, takes possession and neglects to pay taxes, cannot acquire any title thereunder against the mortgagee from a third person who buys a tax title.

And see McAlpine vs. Zitner, 119 Ills., 273, cited below.

2nd. The purchase of tax titles generally by the district is *ultra vires*, and no claim under them can be asserted by it. The district has no legal capacity to acquire or receive and hold tax titles. It is not a municipal corporation, scarcely *quasi* municipal. It possesses only the limited powers conferred by the statute—to levy and collect repair and maintenance assessments. These when collected can only be applied to the payment of the cost of repair and maintenance. They cannot be diverted into a speculation in tax titles.

Argument.

Tax Titles are no Defense.

The Supreme Court of Illinois say: "A drainage district is recognized for a special limited purpose and is only authorized to raise funds for the specific objects for which it is formed and only by special assessments, which cannot exceed the benefits to the owner.

Badger vs. Inlet Drainage District, 141 Ills., 540.

3d. These alleged tax titles have no materiality in this case in any view that may be taken of them.

Complainants' bill is filed only to enforce the lien of the levee assessments. Their validity and amounts are the only questions in the case. The validity or priority of independent outstanding tax titles in third persons cannot be litigated in this suit. Such titles are mere legal titles and must be tried in a court of law.

On the other hand, if the district or land owners have purchased tax titles for the purpose of strengthening their record titles or mortgages, then they are subject to the lien if any of the original assessments.

Many adjudications support the proposition, but we cite only the illinois cases, for on this question they declare a rule of property and are conclusive in this case.

McAlpine vs. Zitzer, 119 Ill., 273 (1887), was a bill in equity to foreclose a mortgage executed by John Von Gunten to the appellants. Charles Von Gunten was made a party to the bill, which sought to set aside a tax deed. Charles Von Gunten, the son of John Von Gunten. purchased for an insignificant sum the tax titles to the premises and secured a tax deed to them, his father continuing to exercise proprietorship over them. During the suit the son quit claimed to Julia Zitzer, his sister. The Circuit

Argument.

Tax Titles are no Defense. Equities are with Complainants.

Court rendered a decree of foreclosure; on appeal to the Appellate Court the bill was dismissed as to the sister, but affirmed in all other respects, then this appeal was taken, when the judgment of the Appellate Court was reversed and that of the Circuit Court affirmed. Held, that as there as collusion between father and son, the tax sale can have no other effect "than if the mortgagor had, himself, been the purchaser at the tax sale, and we hold that the tax title is subject to the mortgage." Where there is no collusion, "mere legal titles are for trial and determination in courts of law," and independent legal titles which are paramount should not be drawn in controversy.

Citing Gage vs. Perry, 93 Ill., 176.
Bozarth vs. Landers, 113 Ill., 181.

The argument in 1st and 3d subdivisions of this head apply to all the alleged tax titles, as well to those held by individuals, as those in name of the District. If the Court should hold otherwise, inasmuch as the superiority of the tax titles, if legally acquired, over the lien of the levee assessments depends on the considerations above stated, the question is one of detail which should go to a master.

In conclusion, the cause is one where all the equities are on the side of the complainants. Their money built in great part this public work.

The defendants have constructed the levee with the money of complainants and other bondholders; repaired and maintained it; held continuous possession and protected their lands with it ever since it was completed. During this time they have grown crops of great value on their lands—on an average of one-half of those of 1880—

worth ten millions of dollars. The levee has not broken since 1888 and is now as solid and firm as a natural river bank. The lands which it protects are now among the richest and most fertile in the State and worth at least five million dollars!

Through the constitutional and statutory legislation which defendants procured under the expressed object of repairing and maintaining the levee they are receiving annually ample means to repair, maintain and preserve it. By disregarding the just claims of the bondholders they have, through lapse of time, escaped the payment of nearly one-half of the bonds. Why then should they not pay Mr. Palms' children the $350,000.00 and interest which is due them in honesty and good conscience? Their right is clear and the remedy is simple.

It is respectfully submitted, that the decrees of the United States Circuit Court for the Southern District of Illinois in Equity and of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed, with costs, and that a decree should be granted by this Court;

(1) Declaring that the Act of the General Assembly of Illinois approved April 24, 1871, was constitutional and valid and the levee drainage assessments levied thereunder described in the bill were valid liens upon the land assessed as respects complainants' claim, or,

(2) If this Honorable Court shall decide that the said Act of April 24, 1871, was unconstitutional, that a decree should be entered in favor of complainants, declaring that certain of said assessments upon certain lands of certain defendants are valid as respects complainants, because of such acts of estoppel as shall be found and declared by this Honorable Court; and that

(3) The cause be remanded to the Circuit Court of the United States for the Southern District of Illinois in Equity for further proceedings in accordance with the opinion of this Honorable Court; and that

(4) In either case the cause be referred to a master to be appointed by this Honorable Court or by said Circuit Court, as this Honorable Court shall direct, to ascertain and report in detail the several amounts of said assessments, and the several descriptions of the lands upon which they are liens, which under the opinion of this Honorable Court should be applied to the payment of complainants' bonds, and that upon the coming in of said master's report and its approval by said Circuit Court a decree shall be entered in the cause declaring that the said several amounts so reported by the master or so much thereof as shall be approved by the Court are liens on the said lands respectively, and providing that in default of the payment thereof within a reasonable time to be named in said decree the said lands shall be separately sold thereunder at a master's sale for the satisfaction of the several amounts respectively assessed thereon and named in said decree with interest, and that complainants be at liberty to bid thereon at such sale.

HENRY M. DUFFIELD,
Counsel for Complainants.

EXHIBIT "A."

SCHEDULES OF LANDS AND ASSESSMENTS THEREON BELONGING TO SOME TYPICAL DEFENDANTS.

NOTE.—The Bound Book, Exhibit "A," has two series of page numbers, i. e., the first from page 1 to 133. *This is the second assessment.*

The second series begins with p. 1 following p. 133 and continues to the end of the volume, but is the *first assessment.*

The starred figures denote the pages of the *second series,* but *first assessment.*

The figures without stars denote the *first series,* but *second assessment.*

SOME OF THE DEFENDANTS WHO WERE PETITIONERS FOR FIRST ASSESSMENT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
M. M. Aldrich.....	S. W.....	6	5	7	$309 66	$310 94	$620 60	*41 43	2	Admits the fact. Answer of J. Wheelock et al., pp. 55-40.
	W. ½ N. E.....	7	5	7	68 45	97 09	165 54	*42 44		
Melville D. Massie....	E. ½ S. W.....	7	5	6	436 00	130 40	566 40	*54 56	35	Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	S. ½ S. E. S. W.....	17	5	6	43 87	13 15	57 02	*55 57		
	S. W. S. W.....	17	5	6	162 19	48 54	210 73	*55 57		In Compt's testimony, Record, p. 96.
	10 acres S. side N. E. N E.	19	5	6	218 00	16 30	234 30	*56 58		
	W. ½ N. E.....	19	5	6	436 00	130 40	566 40	*56 58		
	N. W. N. W.....	20	5	6	88 00	26 40	114 40	*57 59		
	S. W. N. W.....	20	5	6	218 00	65 20	283 20	*57 59		
	N. W. S. E. except 10 acres on N. side.....	26	5	7	194 34	53 46	247 80	*50 52		
	N. pt. S. W. S. E.....	26	5	7	60 82	13 52	74 34	*50 52		
Samuel M. Spencer....	S. ½ S. W. E. of Sny...	18	4	7	311 95	90 30	402 25	*26 28	50	Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	43 16-100 acres S. E. cor. N. W. ¼.....	19	4	7	1,153 38	344 97	1,498 35	*27 28		Compt's testimony, Record, p. 74.
	N. W. ¼ S. of Wabash Ry.....	19	4	7	1,153 38	344 97	1,498 35	*27 28		

SOME OF THE DEFENDANTS WHO WERE PETITIONERS FOR SECOND ASSESSMENT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Norman Brown.....	W. ½ N. W.....	10	7	5	436 00	130 40	566 40	*83	87	6 Admits the fact. Answe
	S. E. N. W.....	10	7	5	218 00	65 20	283 20	*84	87	of J. G. Wheelock et al.
	S. W.....	10	7	5	872 00	260 80	1,132 80	*84	87	Record, pp. 55-40.
Charles N. Clark....	120 acres S. End S. E.	4	5	7	811 13	242 53	1,053 66	*40	42	7 Admits the fact. Answe
	N. E.....	9	5	7	679 91	230 26	910 17	*43	44	of J. G. Wheelock et al.
	S. E.....	9	5	7	781 96	234 91	1,016 87	*43	45	pp. 55-40.
	Und. ½ S. W.....	2	7	5	872 00	260 80	1,132 80	*80	83	Compt's testimony, Re
	Und. ½ S. E.....	2	7	5	872 00	260 80	1,132 80	*84	83	ord, p. 60.
	Und. ½ N. E.....	11	7	5	872 00	260 80	1,132 80	*84	83	
	Und. ½ N. W.....	11	7	5	872 00	260 80	1,132 80	*84	83	

SOME OF THE DEFENDANTS WHO WERE SIGNERS OF TRUST DEEDS.

Richard H. Baker....	S. ½ S. W. S. E.....	6	4	7	90	27	1 17	*21	22	3 Admits the fact. Answe
	N. E. S. W.....	12	4	8	218 00	65 20	283 20	*13	13	of J. G. Wheelock et al.
	W. ½ E. ½ N. W.....	7	4	7	325 03	97 21	422 24	*21	23	Record, pp. 55-41.
	N. E. N. W. S. W.....	12	4	8	54 50	16 30	70 80	*13	13	Copy of Trust Deed re
	E. 10 acres S. ½ W. ½ N W.....	7	4	7	338 66	99 64	438 30	*22	23	ferred to p. 499, no printed.
	S. E. N. W. S. W.....	12	4	8	54 50	16 30	70 80	*13	13	
	Lot 1 E. side S. W.....	7	4	7	381 50	114 10	495 60	*22	23	
	W. ½ N. W. S. W.....	12	4	8	109 00	32 60	241 60	*13	13	
	Lot 2 mid. sub. S. W....	7	4	7	436 00	130 40	566 40	*22	23	
	S. W. S. W.....	12	4	8	145 35	43 47	188 82	*13	13	
William H. Gray.....	S W.....	24	6	6	701 36	209 76	911 12	*70	72	19 Admits the fact. Answe
	N. W.....	25	6	6	854 72	255 63	1,110 35	*70	72	of J. G. Wheelock et al.
	N. W.....	19	6	5	976 90	292 16	1,269 06	*73	76	Record, pp. 55-41.
										Testimony, Record, p. 277
William D. Shinn.....	N. W. ¼.....	30	6	5	872 00	260 80	1,132 80	*75	78	55 Admits the fact. Answe
	N. E. ¼.....	25	6	6	872 00	260 80	1,132 80	*70	72	of J. G. Wheelock et al.
	S. W. ¼.....	36	6	6	872 00	260 80	1,132 80	*71	74	Record pp. 55-41.

SOME OF THE DEFENDANTS WHO PETITIONED FOR ORGANIZATION OF SNY ISLAND LEVEE DRAINAGE DISTRICT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Isaac Barton	S. E.	29	6	5	533 17	159 45	692 62	*75 78	5	Admits the fact. Answer of J. G. Wheelock et al., pp. 55-41.
	E. ½ N. E.	32	6	5	654 00	195 00	849 00	*76 79		
	Und. ½ S. E.	3	6	6	872 00	260 80	1,132 80	*65 67		
	N. E. N. W.	10	7	5	217 99	65 19	283 18	*83 86		
	W. ½ N. W. S. W.	3	7	5	872 00	260 80	1,132 80	*81 84		
	N. ½ S. E.	10	7	5	872 00	260 80	1,132 80	*84 87		
	N. E. ¼	26	6	6	857 72	256 54	1,114 26	*70 73		
Ozias M. Hatch	N. E.	25	4	8	872 00	260 80	1,132 80	*19 19	22	Admits the fact. Answer of J. G. Wheelock et al., pp. 55-41.
	N. W.	25	4	8	872 00	260 80	1,132 80	*19 19		
	N. E.	4	6	6	872 00	260 80	1,132 80	*65 68		

SOME OF THE DEFENDANTS WHO WERE MADE PARTIES TO SNY ISLAND LEVEE DRAINAGE DISTRICT PROCEEDINGS.

J. W. Boyd	S. W. N. E.	6	5	6	221 37	66 20	287 57	*52 54	4	Record, p. 34.
	S. E. N. E.	6	5	6	100 94	30 20	131 14	*52 54		Record, p. 101.
	E. ½ N. pt. W. ½ S. W.	6	5	6	154 23	46 12	200 35	*52 54		
	N. pt. E. ½ S. W.	6	5	6	209 73	62 72	272 45	*52 54		
	W. ½ S. E.	6	5	6	436 00	130 40	566 40	*53 55		
George W. Wells	S. pt. E. ½ N. W.	18	7	4	42 82	12 81	55 63	*93 96	66	Record, p. 36.
	E. ½ N. E. S. W.	18	7	4	16 34	4 89	21 23	*94 97		Record, p.101.
John H. Webster	S. pt. S E.	18	7	4	87 72	34 25	121 97	*94 97	67	Record, p. 36.
	N. E. pt. N. E.	19	7	4	545 33	163 33	708 66	*94 97		Record, p. 101.

SOME OF THE DEFENDANTS WHO ACQUIRED TITLE FROM PETITIONERS FOR FIRST AND SECOND ASSESSMENTS AND FOR THE ORGANIZATION OF SNY ISLAND LEVEE DRAINAGE DISTRICT.

DEFENDANT'S NAME.	NAME OF PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Tp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
bner V. Wills	James M. Spencer	28 67-100 acres N. of Ry. N. E. ¼	23	4	8	950 64	284 32	1,234 96	*18	18	64	Record, p. 28.
		8 52-100 acres N. side N. W. ¼	23	4	8	839 02	250 93	1,089 95	*18	18		Record, p. 124.
oel K. Scarborough	James M. Spencer	S. ½ S. W.	24	4	8	872 00	260 80	1,132 80	*19	19		Record, p. 28.
		N. E. ¼	25	4	8	872 00	260 80	1,132 80	*19	19		Record, p. 254.
		N. E. ¼	26	4	8	872 00	260 80	1,132 80	*19	19		
		N. W. ¼	26	4	8	860 01	253 53	1,113 54	*19	20		
		S. W. ¼	26	4	8	267 97	80 15	348 12	*19	20		
		S. E. ¼	26	4	8	885 62	264 87	1,150 49	*19	20		
acob H. Dickason	N. S. Rouse	N. W. N. E.	27	4	8	187 53	39 03	226 56	*19	20	11	Record, p. 27. Record p. 146.

SOME OF THE DEFENDANTS WHO HAVE ACQUIRED TITLE SINCE DATE OF PETITION FOR SNY ISLAND LEVEE DRAINAGE DISTRICT, JAN. 26th, 1880.

oel L. Doud		S. W. N. E.	26	4	7	45 46	10 63	56 09	*30	32	12	Record, p. 37.
		N. W. S. E.	26	4	7	52 78	15 92	68 70	*31	32		Record, p.313.
		N. E. S. E.	32	4	7	218 00	65 20	283 20	*35	36		
William P. Pryor		N. ½ N. W.	12	6	6	70 67	21 17	91 84	*67	70	44	Record, p. 38.
		S. ½ N. W.	12	6	6	174 90	52 33	227 23	*67	70		Record, p. 319.
Charles Robb		S. E. S. W.	26	5	6	3 49	1 04	4 53	*59	61	46	Record, p. 38.
		N. ½ N. E. N. W.	35	5	6	54 28	16 13	70 41	*62	64		Record, p. 318.
		N. ½ N. W. N. W.	35	5	6	72 08	21 55	93 63	*63	65		
		S. ½ N. W. N. W.	35	5	6	101 69	30 41	132 10	*63	65		

POOR COPY

SOME OF THE DEFENDANTS WHO ACQUIRED TITLE FROM SIGNERS OF TRUST DEEDS.

DEFENDANT'S NAME.	SIGNERS OF TRUST DEEDS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Daniel C. Bates	R. M. Atkinson	20 acres W. side E. ½.	13	5	7	1,744 00	521 60	2,265 60	*44 46	4	Record, p. 287.
Wm. P. Lovett	R. M. Atkinson	76 acres S. pt. N. W.	13	7	5	782 95	234 18	1,017 13	*85 88	31	Record, p. 196.
		S. W. ¼	13	7	5	872 00	260 80	1,132 80	*85 88		

SOME OF THE DEFENDANTS WHO HAVE TAKEN TITLE BY DEEDS RECOGNIZING THE LEVY OF THE ASSESSMENTS.

M. Alger	S. E. Und. ½	8	4	8	872 00	260 00	1,132 80	*11 11	1	Record, p. 40.
	W. ½ S. W.	9	4	8	872 00	260 80	1,132 80	*11 12		Transcript, p. 580.
	Lots 12 and 13, W. ½ N. W.	16	4	8	436 00	130 40	566 40	*15 16		
	E. ½ N. E.	17	4	8	401 39	120 04	521 43	*17 17		
	11 99-100 acres N. W. Cor. N. E.	17	4	8	218 00	65 20	283 20	*17 17		
Louis Green	S. W.	32	4	7	872 00	260 80	1,132 80	*34 36	19	Record, p. 40. Transcript, p. 580.
Christopher D. Greene	W. ½ S. W.	28	5	6	436 00	130 40	566 40	*60 62	20	Record, p. 40. Transcript, p. 580.

SOME OF THE DEFENDANTS WHO ARE HEIRS AT LAW OF PERSONS ESTOPPED.

DEFENDANT'S NAME.	ANCESTOR'S NAME.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
B. Atkinson	R. M. Atkinson	N. E. Und. ½	14	5	7	872 00	260 80	1,132 80	*44 46	1	Record, p. 260.
		Frac. S. W. Und. ½	22	5	7	231 57	49 45	281 02	*47 49		
		E. E. Und. ½	22	5	7	752 07	267 17	1,019 24	*47 49		
		N. E. Und. ½	19	6	5	608 76	182 06	790 82	*73 76		
		S. W. S. W. Und. ½	19	6	5	154 99	46 35	201 34	*73 76		
		S. E. Und. ½	19	6	5	804 42	240 60	1,045 02	*73 76		
		N. E. Und. ½	7	6	6	840 22	240 53	1,080 75	*66 68		
		N. W. N. E.	11	6	6	218 00	65 20	283 20	*67 69		
		S. ½ N. E.	11	6	6	342 91	102 55	445 46	*67 69		
		S. W. Und. ½	30	7	4	438 35	131 50	569 85	*101 101		
Harry Higbee		S. ½ S. W.	5	5	6	5 70	1 70	7 40	*52 54	24	Record, p. 270.
		N. ½ N. W.	8	5	6	147 22	44 35	191 57	*54 56		
		N. E.	29	5	6	872 00	260 80	1,132 80	*60 62		
		S. W.	29	5	6	872 00	260 80	1,132 80	*60 62		
		S. W.	33	5	6	872 00	260 80	1,132 80	*62 64		
		S. E.	31	5	6	744 08	222 54	966 62	*61 63		
		N. E.	32	5	6	872 00	260 80	1,132 80	*61 63		
		Section	31	7	4	1,646 59	556 67	2,203 26	*101 101		

EXHIBIT "B."

An Act to Provide for the Construction and Protection of Drains, Ditches, Levees and Other Works.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That whenever one or more owners or occupants of land shall desire to construct a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of it or their proposed starting point, route and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter.

Sec. 2. Such petition having been filed, as provided in the preceding section, the petitioners shall cause at least two weeks' notice to be given by posting notices in at least three of the most public places in each congressional township through which the drain or drains, ditch or ditches, levee or other works, is or are proposed to be constructed, or if the same shall not be inhabited, in the nearest inhabited township, and by publishing a copy thereof in some newspaper published in the county in which the petition is filed, at least once in each week for two successive weeks, or if no newspaper is published in such county, then in the nearest newspaper published in the State. Such notice

shall state when and in what court the petition is filed, the starting point, route and terminus of the proposed drain or drains, ditch or ditches, or levees, and if a levee or other work is intended to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition.

Sec. 3. The county court in which such petition shall be filed may hear the petition at any probate or law term thereof, and may determine all matters pertaining thereto under this act, and may adjourn the hearing from time to time, or continue the case for the want of sufficient notice or other good cause.

Sec. 4. In case the drain or drains, ditch or ditches, levee or other work proposed to be constructed shall pass through or over, or be constructed upon lands lying in different counties, the petition may be filed in the county court of either of such counties.

Sec. 5. On the hearing of any petition filed under the provisions of this chapter, all parties through or upon whose land any of the proposed work may be constructed, or whose land may be damaged or benefited thereby, may appear and contest the necessity or utility of the proposed work, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto. If it shall appear to the court that the proposed drain or drains, ditch or ditches, levee or other work is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby for agricultural and sanitary purposes, the court shall so find, and appoint three competent persons as commissioners to lay out and construct such proposed work. In case the lands to be drained shall be situated in different counties, not more than two of the commissioners shall be chosen from any one of such coun-

ties. If the court shall find against the petitioners, the petition shall be dismissed at the cost of the petitioners.

Sec. 6. Before entering upon the duties of their office, such commissioners shall take and subscribe an oath faithfully to discharge the duties of their office without favor or partiality, and to render a true account of their doings to the court by which they were appointed, whenever required by law or by the order of the court.

Sec. 7. They shall elect one of their number chairman, and may elect one of their number or some other person as secretary.

Sec. 8. A majority of the commissioners shall constitute a quorum, and a concurrence of a majority of their number in any matter within their duties shall be sufficient.

Sec. 9. As soon as may be after their appointment, or within such time as the court may direct, the commissioners shall examine the land of the petitioners proposed to be drained, and the lands over or upon which the work is proposed to be constructed, and inquire and determine:

1. Whether the starting point, route and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all respects proper or most feasible, and if not, what is or are so.

2. The probable cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor.

3. What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work.

4. What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding.

Sec. 10. If the commissioners shall find that such costs and expenses are more than equal to the benefits there will be bestowed upon the land to be benefited, they shall so report, and the proceeding shall be dismissed at the cost of the petitioners.

Sec. 11. If the commissioners shall find that the proposed work or such portion of the same as will be satisfactory to the petitioners, can be done at a cost and expense not exceeding such benefits, they shall proceed to have the proper surveys, profiles, plans and specifications thereof made, and shall report their conclusions and a copy of such surveys, profiles, plans and specifications to the court which appointed them.

Sec. 12. The commissioners shall not be confined to the point of commencement, route or terminus of the drains or ditches, or to the number, extent or size of the same, or the location, plan or extent of any levee or other work to that proposed by the petitioners, but shall locate, design, lay out and plan the same in such manner as they shall think will drain the petitioners' land with the least damage, and greatest benefits of all lands to be affected thereby, and any plans proposed by such commissioners may, on the application of any person interested, or of the commissioners, be altered upon the order of the court, in such manner as shall appear to the court to be just.

Sec. 13. Upon the report of the commissioners being filed with the clerk of the court appointing such commissioners, they shall cause notice to be given in the same manner as is provided in section two of this chapter, which

notice shall state the time of filing such report, and upon what day application will be made for the confirmation of such report, at which time all persons interested may appear and contest the confirmation thereof, or that the same ought to be modified in any particular, and may offer any competent evidence in support thereof.

Sec. 14. If, upon the hearing, the court shall be of opinion that the objections are not well taken, or if no objections shall be made, it shall order the confirmation thereof. If it shall appear that the same ought to be modified, and the court shall be sufficiently informed in the premises, it shall modify the same to conform to the equities in the premises; or if not sufficiently informed, it shall order the commissioners to review and correct their report, and may make specific directions in what respect they shall reform their report. And the court may make all necessary orders in the premises, either for the continuance of the hearing, or other lawful purpose.

Sec. 15. If the report is referred back to the commissioners for amendment, the court may fix a day when the commissioners shall again present their report, in which case the hearing shall stand adjourned to that day, and no further notice shall be required thereof. If no day shall be fixed for such report, the cause shall be continued to the next term of court, when it shall stand for hearing.

Sec. 16. When the report of the commissioners shall be confirmed, the court may impannel a jury of twelve men competent to serve as jurors, who shall be sworn to faithfully and impartially perform the duties required of them to the best of their understanding and judgment, and to make their assessment of damages and benefits according to law; or the court may direct that a jury be impanneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners may apply

to any justice of the peace in the county, who shall immediately, without the formality of any written application, proceed to summons and impannel a jury of six men competent to serve as jurors, who shall be sworn in the same manner as is above provided in case of a jury impanneled by the court in which the proceeding is pending, and the justice shall enter upon his docket a minute of such proceeding before him and the names of the jurors.

Sec. 17. In either case the jurors shall elect one of their number as foreman, and shall proceed to examine the land to be affected by the proposed work, and ascertain to the best of their ability and judgment the damages and benefits which will be sustained by, or will accrue to, the land so affected by the construction of the proposed work, and shall make out an assessment roll, in which shall be set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as shall be most convenient, the number of acres in each tract, and if damages are allowed, the amount of the same, and if benefits are assessed, the amount of the same, and in case damages are allowed to, and benefits assessed against, the same tract of land, the balance, if any, shall be carried forward to a separate column for damages or benefits, as the case may be.

Sec. 18. In making such assessment the jury shall award and assess the damages and benefits in favor of and against each tract separately, in the proportion in which such tract of land will be damaged or benefited; and in no case shall any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it will be benefited by the proposed work, according to the best judgment of the jury.

Sec. 19. Whenever it shall appear to the jury that a drain, ditch, levee, or other work has been, in whole or in

part, constructed for the purpose of draining any land to be affected by the work proposed under this chapter, and such work shall be found to be of benefit to such lands, and any of the lands to be benefited have borne any part of the expense of such work, either pursuant to an assessment or otherwise, the jury may allow to the owner of such land, and deduct from the assessment which they may make against the same, the amount of the expense of such work so borne by such lands, or such part thereof as will make an equality of burdens and benefits as between the several owners of lands benefited. (See also Sec. 100.)

Sec. 20. When the jury shall have completed their assessment of damages and benefits, they shall fix a time and place when and where they will attend, in case a jury was impanneled by the court in which the petition is filed, before some justice of the peace in the county, where some part of the land affected is situated, or if the jury was impanneled by a justice of the peace, before the same justice for the correction of their assessment; and the commissioners or the jury shall give at least ten days' notice of such time and place by posting notices, as required in section two of this chapter, and by causing a copy of such notice to be sent by mail, addressed to each owner or occupant of land allowed for damages, or assessed for benefits, whose name and residence is known to the commissioners. The affidavit of any credible person that he deposited such notice in the postoffice, addressed to the owner or occupant named, at his place of residence, postage paid, shall be sufficient evidence of the sending of such copy of notice pursuant to this section.

Sec. 21. The jury shall appear at the time and place appointed, and shall hear all objections that may then and there be made by the owners or occupants of any lands which may be allowed damages, or assessed for benefits, or by the commissioners, to the allowance of damages to,

or assessment of benefits against any tract of land, and shall make such correction as shall seem to them just, and shall adjust such assessment so as to make the same just and equitable.

Sec. 22. At such hearing the justice of the peace shall preside, and may compel the attendance of witnesses and enforce order in the same manner as in other cases before justices of the peace; and in case any juror impanneled shall fail to appear, may attach him for contempt, or may impannel another in his stead, and may at any time during the proceedings, in making or considering their assessment, impannel jurors in the place of any who shall refuse or fail to act, and administer to such jurors the oath required by section sixteen of this chapter.

Sec. 23. If no objection shall be made to the assessment at the time and place so appointed to hear objections, or when found correct, or corrected upon the hearing, the jury shall confirm such assessment, which shall be certified by the foreman of the jury and delivered to the commissioners, who shall return the same to the next term of the court, in which the petition shall have been filed, and the same shall stand for hearing at that term, or may, for good cause, be continued.

Sec. 24. The commissioners, or any person who shall have made objections to such assessment, may appeal from the finding of the jury to the court in which the assessment is returned by giving notice of his or their intention to take such appeal, within ten days after such confirmation by the jury, and filing with the clerk of such court his or their bond, payable to the opposite party, with such security and in such an amount as shall be approved by the clerk, conditioned to pay all costs that may accrue by reason of such appeal; and if the appeal is by an owner or occupant of land assessed for benefits, to pay such an amount as shall

be found against him on account of benefits to his land by reason of such work.

Sec. 25. The trial upon appeal may be in the same manner as upon other appeals from justices of the peace, and in case the assessment of damages or benefits shall be changed from that returned to the court, the court shall cause the assessment roll to be aended to conform thereto.

Sec. 26. When the assessment roll shall have been corrected as aforesaid, or in case no correction shall be required to be made, the court shall confirm the same, and cause it to be spread upon the records, and appeal or writ of error shall be allowed therefrom.

Sec. 27. At the time of confirming such assessment it shall be competent for the court to order the assessment of benefits to be paid in installments of such amounts and at such times as will be convenient for the accomplishment of the proposed work, otherwise the whole amount of such assessment shall be payable immediately upon such confirmation, *and shall be a lien upon the lands assessed until paid.*

Sec. 28. Immediately after the entry of such confirmation by the court, the clerk shall make out and certify to the commissioners a copy of such assessment roll, and shall also make out and deliver to the commissioners separate copies of the same, pertaining to the lands situated in different counties, which shall be recorded in the recorder's office of the respective counties in which the lands are situated, and shall be notice of the lien thereof to all persons.

Sec. 29. The commissioners, upon receiving such certified copy of such assessment, may proceed to collect the same, or any installment thereof, or they may certify such assessment, or any installment thereof, which they may be entitled to collect at the time, to the county clerk of the

county in which the lands assessed may be situated, who shall extend the same, in a separate column, upon the proper tax books for the collection of state and county taxes, and such assessment or installment thereof so extended *shall be collected and enforced in the same manner as state and county taxes; provided*, the owner, agent or occupant of any land through or on which any drain, ditch, or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the value thereof upon his assessment.

Sec. 30. In case the assessment for benefits shall be payable in installments, such installments shall draw interest at the rate of ten per centum per annum from the time they shall become payable till they are paid, and such interest may be collected and enforced as part of the assessment.

This section was amended in 1872 so as to make installments draw interest from the date of the assessment, and giving more fully the power to assess for interest each year.

Sec. 31. When the commissioners shall have elected to collect any assessment or installment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or installment shall be due and uncollected, and as often as any installment shall become due, and be uncollected at the time for making return of the tax books, for the collection of state and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any installment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for

the collection of state and county taxes in the counties, or respective counties, where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amount so collected to the commissioner(s).

Sec. 32. If three months shall not intervene between the time of the delivery of an assessment warrant to the commissioners, or the falling due of the last of several installments upon any such warrant, and the time for making return of tax books for the collection of state and county taxes in that year, the commissioners may make their return at or before the time for making such returns in the succeeding year.

Sec. 33. The commissioners appointed by virtue of this chapter shall not collect or receive any money for the purposes therein specified until they shall have given bond, payable to the people of the State of Illinois, for the use of all persons interested, in a sum not less than twice the amount of the assessment for benefits, payable in any one year, with such security as shall be approved by the judge of the court, conditioned for the faithful application of all moneys that may be received by them as such commissioners, and to make due account thereof to the court whenever required, which bond shall be filed in the court in which the proceedings are had. The court may require additional bond from time to time.

Sec. 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be necessary in and about the surveying, laying out and constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee, or other work, for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and side-drains, and may employ all neces-

sary agents and servants and enter into all necessary contracts and sue and to be sued.

Sec. 35. The commissioners may borrow money not exceeding in amount the amount of assessment unpaid at the time of borrowing for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof.

Sec. 36. When it shall appear that a drain, ditch, levee or other work has been, in whole or in part, constructed for the purposes of draining any land to be benefited by the construction of any work which they shall be authorized to construct, and the whole, or any part of the cost of such work, shall have been paid or incurred by any person or corporation, if such work shall be valuable for the purposes of draining the land, and can be made useful therefor by such commissioners according to their plans, they may allow and pay to such person or corporation the actual value thereof for such purposes. (See also Sec. 83.)

Sec. 37. All damages over and above the benefits to any tract of land shall be payable out of the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with

the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same.

Sec. 38. The court may at any time remove any commissioner appointed by it, and appoint another in his place, and may fill all vacancies by death, resignation, removal or otherwise, and may appoint a new commission, or authorize the commissioners appointed to repair or cleanse any work, ditch or drain that shall have been constructed.

Sec. 39. Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners, or any owner or occupant of lands affected by any work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, protect or maintain any drain, ditch, levee or other work constructed by virtue of this chapter.

Sec. 40 The commissioners shall receive for their services the sum of three dollars per day for each day they shall be actually engaged in the business of their appointment. They shall fix the compensation of all other servants and agents.

Sec. 41. The commissioners shall, as often as once in each year after their appointment, and as much oftener as the court shall require, make a report to the court by which they were appointed, showing the amount of money by them collected, and the amount and kind of work done, and the manner in which the same is being done.

Sec. 42. When the cost of any proposed drain, ditch, levee or other work authorized by this chapter to be done will not exceed the sum of five thousand dollars, and will not extend through or into more than three congressional townships, the petition may, if the petitioners shall so elect, be filed with a justice of the peace in the county where the

land to be affected, or the major part thereof, is situated; and all the proceedings authorized by this chapter to be had in the county court in cases where the petition is filed in such caurt, may be had before such justice of the peace, and the assessment of damages and benefits shall be conducted before such justice in the same manner, as near as may be, as in cases commenced by petition before such county court, and appeals may be taken from the final judgment of the justice of the peace to the county court within the same time and in the same manner as appeals may be taken from the findings of the jury in cases commenced in the county court. And the assessment of benefits may be collected and enforced as in such cases before the county court.

Sec. 43. When the proceedings shall be had before a justice of the peace, the justice shall direct the commissioners of highways of the town or township, or in case the drain, ditch or other work shall be located in several towns or townships, the commissioners of the several townships, as a joint board, to lay out and construct such work, and perform the duties required of commissioners appointed under this chapter; and such commissioners of highways shall have all the power and authority and may perform all acts and discharge all the duties bestowed upon or required of commissioners appointed by the county court.

Sec. 44. If any commissioner of highways shall refuse or neglect to discharge any of the duties imposed upon him by virtue of this chapter, he shall, for every such refusal or neglect, be liable to any party aggrieved for all damages sustained by him, and, upon conviction, may be fined in any sum not exceeding one hundred dollars, and be removed from his office.

Sec. 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy, or in any manner impair

the usefulness of any drain, ditch or other work constructed under this chapter, or that may have been heretofore constructed, for the purpose of drainage or protection against overflow, may be fined in any sum not exceeding two hundred dollars, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the State of Illinois, and all fines, when collected, shall be paid over to the proper commissioners, to be used for the work so injured.

Sec. 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying or impairing the usefulness of any such drain, ditch, levee or other work shall be liable to the commissioners having charge thereof for all damages occasioned to such work, and to the owners and occupants of land for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction.

Approved April 24, 1871.

EXHIBIT "C."

Abstract of Act of Legislature of Illinois, Approved May 29, 1877.

An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes and to provide for the organization of drainage districts.

Section 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly,* That drainage districts may be organized and established as hereinafter provided.

Sec. 2. Whenever a majority of the owners of lands, within a district proposed to be organized, who shall have arrived at lawful age, and who represent one-third ($\frac{1}{3}$) in area of the lands to be reclaimed or benefited, desire to construct a drain or drains, ditch or ditches, levee or levees or other work, across the lands of others for agricultural, sanitary or mining purposes, or to maintain and keep in repair any such drain or drains, ditch or ditches, levee or levees, heretofore constructed under any law of this State, such owners may file, in the county court of any county in which the greater part of the lands to be affected by said drain or drains, ditch or ditches, levee or levees, or other work proposed to be constructed, maintained or repaired, shall lie, a petition signed by a majority of the owners of said lands, within said district, proposed to be organized as aforesaid, setting forth the proposed name of said drainage district, the necessity of the same, with a description of its or their proposed starting points, route and terminus, and a general description of the lands proposed to be affected, with the names of the owners, when known, and, if

the purpose of said owners is the repair and maintenance of a ditch or ditches, levee or levees or other work, heretofore constructed under any law of this state, said petition shall give a general description of the same, with such particulars as may be deemed important, and may pray for the organization of a drainage district, by the name and boundaries proposed, and for the appointment of commissioners for the execution of such proposed work according to the provisions of this act. But that nothing in this section shall operate to prevent the organization of any drainage district entirely within one county, nor to deprive the county court of such county, of its jurisdiction of the subject matter of any petition filed in accordance with the provisions of this Act. *Provided* that the lands embraced in such drainage district shall be liable for any and all damages which may be sustained by any lands lying above such drainage district, by the construction of any levee, ditch or drain in such district under this act, and the commissioners of any drainage district, composed of lands lying next below another drainage district organized entirely in one county as aforesaid, shall have power to cause the lands lying in such district, entirely within one county, to be assessed in the manner prescribed by this Act for the assessment of benefits to pay all such damages to the lands lying in such lower district and to pay any and all increased costs and expenses of constructing any levee, ditch or drain in such lower district which may be necessary to carry off waters flowing from the higher district, and such lower district shall have the power to connect its levees, ditches, or drains with the levees, ditches or drains of such higher district, and said higher district shall have the power to connect its levees, ditches or drains with levees, ditches or drains of such lower district.

Abstract of Act of Legislature of Illinois, Approved May 29, 1877.

* * * * *

Sec. 28. Upon the organization of said drainage district the commissioners so appointed shall from thenceforth have power to contract and be contracted with, sue and be sued, plead and be impleaded, and to do and perform in the corporate name of said district, all such acts and things as may be necessary for the accomplishment of the purposes of this act.

The remainder of the act follows closely the provisions of the act of 1871. It is very lengthy—seventy sections—and counsel do not deem it necessary to print it in full.

Filed Oct. 19, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 88.

MICHAEL W. O'BRIEN ET AL., EXECUTORS,
COMPLAINANTS AND APPELLANTS,

vs.

JOHN G. WHEELOCK ET AL., DEFENDANTS.

REPLY BRIEF OF APPELLANTS.

HENRY M. DUFFIELD,
Counsel for Complainants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 901

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 38.

MICHAEL W. O'BRIEN ET AL., EXECUTORS,
COMPLAINANTS AND APPELLANTS,

vs.

JOHN G. WHEELOCK ET AL., DEFENDANTS.

REPLY BRIEF OF APPELLANTS.

The additional brief lately filed by former Attorney General Miller for certain of the defendants suggests some new claims of defense, a reply to which may aid the court in its consideration of the case.

I.

His first proposition, that the liens upon the lands of defendants, even if valid, cannot be enforced by a suit in equity, is in the line of the objection made in the main brief for defendants (pages 47 to 55). The defect in this contention is obvious if the peculiar character of the assessments in question is borne in mind. There is no analogy between them and ordinary taxes.

The rule of the supreme court of Massachusetts (which is followed in nearly every other State in the Union) clearly distinguishes the cases of ordinary taxation from special assessments like those in the case at bar. It is concisely stated in Lowell *vs.* Boston, 111 Mass., 454, 468, 469:

"In the statutes for the improvement of meadows the provisions for the assessment and collection of the expenses in form resemble taxation and the powers exercised over private property are sometimes ascribed to the right of eminent domain. But there is no taking for public use. It is a proceeding of a semi-judicial nature in which all those whose lands are affected are joined as parties. The action taken therein relates to that in which all have a common interest or in reference to which all are affected by a common necessity." * * * "We find in these statutes no exercise of the right of eminent domain or of the governmental power of taxation; that which in form resembles taxation is in fact only an equitable apportionment among the parties to the proceedings of the expenses incurred for their common benefit by their common agents, or rather by the officers of the tribunal charged by the legislature with the conduct of these proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided."

It has been settled by the decisions of this honorable court that the liens for ordinary taxes for municipal purposes and assessments for municipal local improvements are not given for the benefit of the creditors of the municipality, but are created for the benefit of the public authorities to enable them with greater certainty and facility to collect the tax without the embarrassment of other claims against the property taxed (Barkeley *vs.* Levee Com'rs, 93 U. S., 258, 265).*

The assessments here in question are neither taxes for the expenses of a municipality or for local municipal im-

*Although this was a proceeding against levee commissioners, it was not an attempt to enforce levee assessments, but to compel by mandamus the *levy* and collection of a tax to satisfy a judgment against the board of levee commissioners.

provements. They are not *ad valorem* taxes, but are separate assessments of specific, but varying, amounts on different parcels of land according to the particular benefit which each parcel receives from the levee improvement.

These amounts have not been imposed *ex parte* by taxing officers, but at every step in the proceeding to ascertain their justness and amount the land-owners have had notice and opportunity to contest them in a court of competent jurisdiction. Not having done so, they must be deemed to have consented to their correctness. They are still reaping the benefits of the levee which the proceeds of the bonds have constructed. What, then, stands in the way of a court of equity to enforce the assessments?

The remedy of foreclosure and sale is a time-honored function of such a court and is most appropriate here.

The levee commissioners are the trustees of complainants, but they refuse to do their duty, and have colluded with the land-owners to continue the latter in the possession and occupancy of the levee and at the same time to prevent the collection of the assessments.

In cases at law, where the equities were not so strong as in this case, this Court has implied an equitable assumpsit on the part of municipalities to repay the moneys which they had raised by unauthorized bonds and expended for the benefit and upon the property of the municipalities.

Louisiana *vs.* Wood, 102 U. S., 294.

Read *vs.* City of Plattsmouth, 107 U. S., 568.

If a court of law can imply an agreement to repay the money in these cases, cannot a court of equity imply an agreement to admit the validity of the assessments in this case?

I respectfully submit that there is no rule of law or in equity which prevents a court of equity in this case enforcing by decree and sale the assessments on the lands of those defendants who have estopped themselves to assail the law and who have colluded with the drainage commis-

sioners to retain possession of the levee and at the same time prevent the payment of the bonds. On the contrary, every principle of equity and good conscience demands it.

II.

The second subdivision of the additional brief raises for the first time the objection to the Illinois drainage statute that—

"It leaves amounts and times of payment of assessments to discretion of the court."

The particular section which it is claimed is open to this objection provides:

"SEC. 27. At the time of confirming such assessment it shall be competent for the court to order the assessment of benefits to be paid in instalments of such amounts and at such times as will be convenient for the accomplishment of the proposed work." * * *

It is claimed that "the legislature herein attempts to delegate to the court the power in its *discretion* to fix the amounts and times for the payment of the assessment," which it is said is beyond the power of the legislature.

It is respectfully submitted that the counsel again confound the true character of the assessments here in question with general taxes or assessments; but, passing that, it is obvious that the claim of counsel in this case that "different amounts might be fixed by the court in each county in the State where such work shall be undertaken, and different times of payment, as well as amounts for different improvements in the same county, and different amounts for different parties under the same improvement," can be no valid objection to the law. The entire scheme of statutes of this character is that different parcels of land shall be assessed for different amounts according and in proportion to the benefit which they receive from the pro-

posed levee or system of drainage (Hagar *vs.* Reclamation District, 111 U. S., 701). It is impossible to construe the statute, whether valid or invalid, as having any other purpose or intention.

Reference is made in the briefs of all the counsel to the amendment to the Illinois constitution in 1875 and the levee law passed thereunder in 1879. The language of section 26 of this act (Revised Statutes of Illinois, 1880 (Hurd), page 437) is identical with the language in section 27 of the drainage act of 1871 here in question. This act of 1879 was repeatedly attacked, but was sustained by the supreme court of the State of Illinois in Blake *vs.* The People, 109 Ills., 504, and in Huston *vs.* Clark, 112 Ills., 344.

III.

A third subdivision of the additional brief is devoted to the proposition that "law cannot be made by estoppel."

No such contention is made by the complainants in this case. The cases cited in the main brief of the complainants are so numerous and so authoritative that it seems scarcely necessary to reopen the discussion.

Daniels *vs.* Tierney, 102 U. S., 411, Ferguson *vs.* Landrum, 1 Bush, 548, and 5 Bush, 230, are sharply, if not sarcastically, criticised in the briefs of counsel. But the principles of these decisions are sustained by the overwhelming weight of authority.

South Ottawa *vs.* Perkins is again cited and quoted, which is my excuse for calling the attention of the Court to the radical difference between the principle therein announced and the one contended for by defendants. The sole question in South Ottawa *vs.* Perkins was whether a law *had in fact been passed by the legislature of Illinois.* The contention arose upon the facts shown by the legislative journals, one side claiming and the other side denying that a majority of all the members-elect in each house

of the General Assembly had voted for the law. The supreme court of Illinois had held that a statute of the State was not a law unless the legislative journals showed it to have been passed by a majority of all the members. The Supreme Court of the United States held that a State might by its constitution and laws prescribe what shall be conclusive evidence of its statutes, and that while, on general principles, the question of the existence or non-existence of a statute is a judicial one, it must, when it arose in the courts of the United States, be decided by them on evidence legally applicable under the laws of the State without taking the advice of a jury on the subject. They further concurred with the supreme court of Illinois, which had so held in two cases, that the act in question was never passed and was not an act of the legislature of that State.

In the case at bar there is no dispute but that the statute in question was in fact enacted, and the questions here arise solely upon its construction and validity. The distinction is clearly stated in Wilkes County *vs.* Coler, 180 U. S., 506–519:

"In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the circuit court of the United States justified in holding the acts of 1868, 1879 and 1881 to be laws of the State? Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose. May a Federal court disregard the decisions of the highest court of the State holding that such enactment in the form of a statute was never passed, so as to become under the State constitution a law? These questions have been so distinctly answered in this court in cases heretofore decided that a discussion of them upon principle is unnecessary."

Referring to—

South Ottawa *vs.* Perkins, *ubi supra.*
Post *vs.* Supervisors, 105 U. S., 667.
Field *vs.* Clark, 143 U. S., 649.

Under his claim that law cannot be made by estoppel, counsel cite a number of cases holding that there was no estoppel in contracts *ultra vires*. But the case at bar is not a case of *ultra vires*. Whenever a corporation executes a contract which is *ultra vires* it violates positive law. It seeks to do that which the courts declare public policy will not allow it to do. As said by Mr. Justice Peckham in Pullman Car Company *vs.* Transportation Company, 171 U. S., 161 (relied upon by counsel for defendants):

"While the company might not have incurred any moral guilt, it has violated the law by making an illegal contract and one which is against public policy and it must take such consequences as result therefrom."

The cases of railroad company leases cited by counsel involve the question of *ultra vires*, and turn on the want of power of a railroad corporation to absolve itself from the performance of its obligations without the consent of the legislature.

Oregon Railway Co. *vs.* Oregonian Railway Co., 130 U. S., 23.

In Thomas *vs.* Railroad Company, 101 U. S., 71–85, the lease of a railroad by one company to another where the organic act of the company did not expressly permit it, is said to be "a contract unauthorized by the charter and *forbidden by public policy*."

In Railway Companies *vs.* Keokuk Bridge Company, 131 U. S., 371–384, one of the reasons given by Mr. Justice Gray "why a corporation is not liable under a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the legislature and varying from the objects of its creation as declared in the law of its organization," is:

"The interest of the public that the corporation shall not transcend the powers granted."

In the case at bar no question of *ultra vires* arises. In the language of the supreme court of Kentucky in Ferguson *vs.* Landrum, 5 Bush, 230:

"In procuring the money and obtaining with it volunteers such parties violated no law of morality or of the Government. Their contract was not void for want of consideration or illegality, but it is the means by which the sum for its reimbursement is to be raised that they assail."

So here, in procuring the money to construct the levee and with it to protect their lands, the land-owners violated no law of morality or of the Government, nor did the bondholders in lending the money, nor the contractors in building the levee, nor was their contract for the construction of the levee void for the want of consideration or illegality, but the land-owners now assail the means by which the sum to reimburse the bondholders is to be raised.

IV.

The claim under the fourth subclaim of the additional brief that "the benefit is only indirect and common to all" is based upon a misapprehension of the facts in the case.

The levee is made upon the lands of the various defendants and directly protects their other lands, and each parcel of land is specifically assessed for the particular amount which the levee benefits it. The cases cited by counsel were decided upon very different facts.

V.

Another ground of objection by the defendants, now raised for the first time, is that "there can be no estoppel because the contract was made and the bonds were issued in violation of a statute."

The claim is that the commissioners, instead of selling

the bonds, entered into a contract for the construction of the levee and paid for the work thereunder by the bonds, which it is claimed is not authorized by section 35, giving the commissioners power to borrow money and secure the same by bonds. Counsel rely on the New York cases cited by him and Rogers *vs.* City of Burlington, 3 Wall., 654. The New York statute expressly required the township officers, acting as commissioners, to sell the bonds for par. Section 3 of the act (Laws of New York, 1868, page 1130):

"The city commissioners * * * may in their discretion dispose of such bonds * * * and upon such terms as they shall deem most advantageous for their said town, but not for less than par."

There is no such restriction in the Illinois statute. The New York act contemplated the borrowing of money by the officers of the town upon the bonds of the township and the investment of that money in the stock of the railroad company. Instead of borrowing the money the township officers delivered the bonds to the company in payment of *stock at its par value*—a very different matter. After this action by the township officers and before the decisions in question a decree had been rendered in an equity suit, to which the railroad company and the township and bondholders were parties, directing the return and cancellation of the stock given to the township officers for the bonds.

Moreover, the New York cases and Rogers *vs.* City of Burlington were cases of municipal aid to railroads in which the money was expended upon the property of the private corporations, and the only advantage, if any, which the municipality received was the indirect benefit of having a railroad in its vicinity. This distinction is recognized in Louisiana *vs.* Wood, 102 U. S., 294, and Read *vs.* City of Plattsmouth, 107 U. S., 568, and is clearly stated in the opinion in Hedges *vs.* Dickson County, 150 U. S., 182–186,

in which, referring to the above cases, the court, speaking through Mr. Justice Jackson, say:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist under the case under consideration, where the county received no part of the proceeds of the bonds and no direct money benefit, but merely derived the incidental advantage arising from the construction of the railroad upon which advantage it would be impossible for the court to place a pecuniary estimate or to say that it would be equal to such portions of the bonds in question as the county could have lawfully issued."

It is said by counsel for defendants that no improvement has been made upon the property of the defendants, who are estopped, nor have they received any benefit peculiar to themselves; but we have shown that this is not a correct statement. The levee is built upon portions of the lands of the various defendants. It still remains there and protects their other lands. It is and has been since its construction continuously in their possession through the agents of their own choice.

VI.

In subdivision six of the additional brief, under the head of laches, the statement is made that "from the date of Judge Drummond's decretal order of 1879 up to the date of the filing of the bill in this case no steps were taken."

No reference is made to the date of Mr. Palms' death; nor to the fact that he resided outside of the State of Illinois (Hallett *vs.* Collins, 10 Howard, 184–187), and for a year or two before his death was unable to travel or leave the city of Detroit (Record, p. 373); nor to the fact that no assessment fell due until 1883, and none of Mr. Palms' bonds fell due until July, 1883; nor to the length of time necessary to trace the titles of the lands from the original owners

to the time of the levee assessment to the present holders; nor to the fact that the land-owners had colluded with commissioners of their own choice and had during all this time maintained possession and occupancy of the levee. No proof whatever is made of any changes wrought by the lapse of time in the value of the property and in the situation of the parties such as to render it inequitable to decree the relief prayed.

Willard *vs.* Wood, 164 U. S., 502–526.

The case at bar is radically different from Felix *vs.* Patrick, 145 U. S., 317; Galliher *vs.* Cadwell, 145 U. S., 368–372, and other decisions of this court in the same line. There is no large increase of value in the property as in those cases. The claim of the complainants today in its principal amount is no greater than it was in 1875. The acts of estoppel are matters of record or are proven out of the mouths of the defendants themselves. In Allore *vs.* Jewell, 94 U. S., 506–512, the lapse of six years before suit was held not to be laches, although the complainant knew all the facts, but there was no prevention by the death of witnesses or other causes of a full presentation of the case.

It is unjust to complainants to charge up to them the long period of time which has elapsed during the extended litigation between these parties. The record shows that on May 4, 1878, Mr. Palms filed the original bill in this cause against the commissioners. It was nearly a year (March 13, 1879) before the commissioners answered. Then a year and three months elapsed (July 7, 1880) before a final decretal order was made. Mr. Palms died November 24, 1886. The complainants in this present case were not appointed as executors until 1887. They filed their bill April 22, 1889. Service was as promptly made as was possible under the circumstances, but by leave of the court the defendants did not respond until the 31st of August, 1889, when they filed the demurrers. The demurrers were heard by Judge Gresham and overruled on

the 25th day of April, 1890, and the defendants given ninety days to answer. They did not answer, however, until January, 1891. Complainants took their proofs promptly, but defendants did not close their testimony until the 15th day of September, 1895 (Rec., pp. 55–58). The cause was submitted for decision to District Judge Allen on the 6th day of November, 1895, but no decision was rendered by him until February 5, 1897. An appeal was taken to the United States Circuit Court of Appeals on the 5th day of April, 1897, and the hearing of the cause was concluded on the 8th day of June, 1898. On the 6th of June, 1899, the court filed its decision. On the 14th day of May, 1900, the petition for certiorari was granted by this Honorable Court.

. Of the "seventeen years'"!! delay stated in the brief there is chargeable to Mr. Palms only the period from 1880 to the date of his death in 1886. During all this time he lived without the State of Illinois. During the first three years no assessment fell due which he could take any steps to collect and none of his bonds had matured upon which he could ask payment through assessments. During the last two years he was physically unable to travel. His executors filed the bill in this case within two years after their appointment, before the Illinois statute of limitations (2 Starr and Curtis Anno. Statutes (Ill.), c. 77, § 6, p. 1386) had run against the earliest maturing assessments or bonds and three years before any bonds of the issue of 1875 had matured.

The claim of counsel that the statute began to run from the time of the payment of the money by Mr. Palms is not maintainable. There is no personal liability of any landowner. Nothing can or ever could have been recovered from any of them in a suit at law. The complainants can only recover through the enforcement of the liens of the assessments.

The sole ground of complainants' case is an equitable estoppel. In the language of Mr. Justice Peckham, speak-

ing for this court in Stone *vs.* Bank of Commerce, 174 U. S., 427:

"It is fitly denominated an equitable estoppel because it rests upon the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights."

As to those defendant land-owners, therefore, who are estopped to assert the unconstitutionality of the law, all its provisions and all the doings of the commissioners under it in conformity with its terms are as binding as if the law was valid.

It must follow that, as to them, the bonds are valid instruments in all their terms. If this be so, then they are entitled to the time of payment named in the bonds and in the assessments, and the bondholder can only collect according to those terms.

HENRY M. DUFFIELD,
Counsel for Complainants.

No. 241. 38.

Affidavit of Duffield.

Office Supreme Court U.S.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

Filed April 8, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 241.

MICHAEL W. O'BRIEN ET AL., EXECUTORS, COMPLAINANTS AND APPELLANTS,

vs.

JOHN G. WHEELOCK ET AL., DEFENDANTS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-8-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 241.

MICHAEL W. O'BRIEN ET AL., EXECUTORS, COMPLAINANTS AND APPELLANTS,

vs.

JOHN G. WHEELOCK ET AL., DEFENDANTS.

STATE OF MICHIGAN, }
County of Wayne, } *ss:*

Henry M. Duffield, being duly sworn, deposes and says, in reply to the application of A. C. Matthews and Harry Higbee for a continuance of this cause:

1. Milton Hay died before the argument of the cause in the circuit court of the United States for the southern district of Illinois before Judge Allen in November, 1895.

2. Henry S. Greene died in February, 1899, before the petition for certiorari was filed in this cause.

3. General Harrison died March 13 last.

4. On the 10th of March deponent wrote Mr. Worthington, with whom all deponent's correspondence in respect of

this case has been, to know what effect General Harrison's illness would have on the hearing of the cause on the regular call, stating that this deponent's other professional engagements made it important that he should know as soon as possible whether the cause would be heard this term.

March 15 Mr. Worthington replied: The defendants "cannot be ready unless the court takes an adjournment until about April 8th. I will be pleased to have you join me in asking for that much of an adjournment if it become necessary," and stating he had not had a conference with his associates and probably could not get them together before "Monday next" (March 18), and saying: "I will only state that so far as I am concerned I do not think we will ask any continuance."

5. Deponent at once telegraphed the clerk of this court and March 18 received a reply that the cause would not be reached before week of April 8. On the same day deponent received the following telegram:

"PITTSFIELD, ILL., *March 18th*, '01.

"General HENRY DUFFIELD,
Detroit, Mich.:

"To avoid postponement we offer to submit Sny Levee case on call without oral argument provided your brief furnished by us twenty-second. Do you accept proposition? Reply at Pittsfield immediately.

"MATTHEWS, HIGBEE & WORTHINGTON."

"To which deponent replied, 'Cannot consent. Clerk telegraphs case will not be reached before week of April 8th.'

"HENRY M. DUFFIELD."

7. April 2 deponent received the following telegram:

"JACKSONVILLE, ILLS., 2 *April*, 1901.

"Gen'l HENRY M. DUFFIELD, *Detroit:*

"Please forward me copy brief here and Springfield and Matthews, Pittsfield and Higbee, Ottawa, Ills.

"THOMAS WORTHINGTON."

8. Deponent at once, within an hour of receipt of dispatch, forwarded the copies of briefs as requested by mail, with full postage thereon paid, in addition to the twenty-five (25) copies sent to the clerk, as required by the rules of this honorable court.

9. Deponent further says that on the same day, in response to a telegraphic request from Mr. A. G. Crawford, who appeared in the court of appeals for other defendants, he also sent said Crawford a copy of deponent's brief.

10. Deponent has heard nothing further from either Mr. Worthington, Matthews, or Higbee until the date hereof, when he received the application for a continuance filed herein and sworn to April 2, with a letter of transmittal dated Pittsfield, Illinois, April 4, 1901, and later, on the same day, received a copy of a full brief in this case with the names of General Harrison, A. C. Matthews, Thomas Worthington, Harry Higbee, and J. Otis Humphrey thereon as counsel for the defendants, and that much of the same is in the precise language of General Harrison's answer to the petition for certiorari in this cause.

11. That he has no information from either Mr. Worthington, who, together with General Harrison, appears on the brief in the United States circuit court of appeals with Mr. Mat-

thews and Mr. Higbee, or from Mr. Crawford that they are not ready to argue the case when reached.

12. Deponent further says that this case was argued in the court of appeals on behalf of the defendants by General Harrison, Mr. Greene, Mr. Worthington, Mr. Higbee, and Mr. Crawford; that one brief filed in the court of appeals was signed by those gentlemen and J. O. Humphrey, another signed by Mr. A. G. Crawford for other defendants; that in addition to said brief stenographic notes of General Harrison's argument were taken and printed and filed in said court of behalf of defendants.

13. General Harrison signed and, as deponent believes, revised or prepared the reply to complainants' petition for a rehearing in the circuit court of appeals, and also signed and, as deponent believes, revised or prepared the answer to complainants' petition for certiorari to this court.

14. Under these circumstances deponent has arranged his other professional engagements so that he might argue this cause when called in its regular order, and was warranted in so doing by the conduct of the counsel in the case, who now suddenly and without assigning any reason for the change ask a continuance until the next term of this court.

HENRY M. DUFFIELD.

Sworn and subscribed before me this — day of April, 1901.

[NOTARIAL SEAL.] DIVIE B. DUFFIELD,
Notary Public, Wayne County, Michigan.

No. 588 Brief

Brf. of Harrison & Worthington for Respondents

Office Supreme Court U. S.
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Filed Sept. 30, 1900.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

MICHAEL W. O'BRIEN ET AL.,
Executors, etc.,
Petitioners,
vs.
JOHN G. WHEELOCK ET AL.,
Respondents.

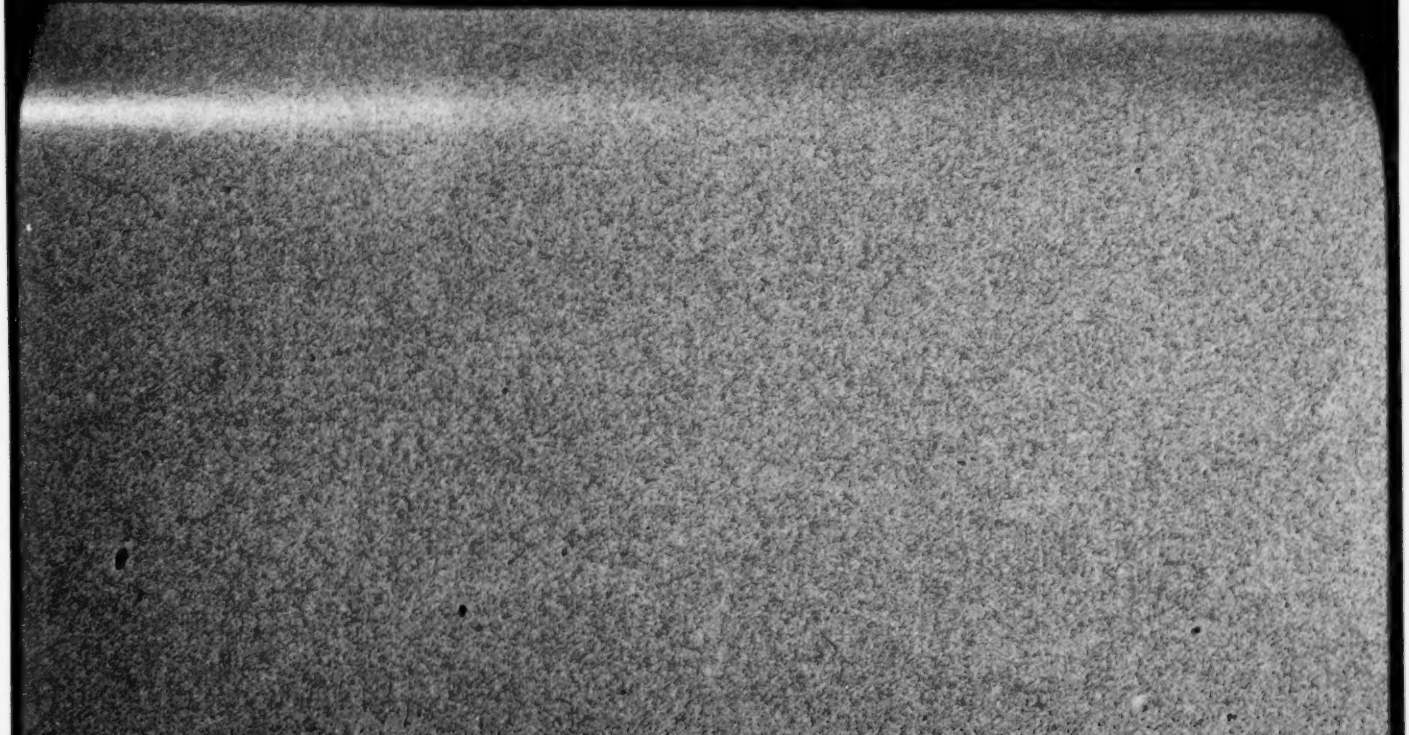
PETITION FOR WRIT OF CERTIORARI.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

BENJAMIN HARRISON,
THOS. WORTHINGTON,
Counsel for Respondents.

ASA C. MATTHEWS,
HARRY HIGBEE,
ALBERT G. CRAWFORD,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.



In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

MICHAEL W. O'BRIEN ET AL., Executors, etc., Petitioners, vs. JOHN G. WHEELOCK ET AL, Respondents.	Petition for Writ of *Certiorari*.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

Respondents desire to avail themselves of the privilege granted by the rules of this Court to reply, as briefly as may be, to the petition for a Writ of *Certiorari* filed in this cause.

The statement of facts submitted by counsel for petitioners is so brief, and omits so many matters which counsel for respondents consider material, that it is necessary to make a separate statement of some of the facts appearing in the record which appear to be material on this hearing.

General Statement.

I. On April 24th, 1871, the General Assembly of the State of Illinois passed an Act entitled "An Act to provide for the construction and protection of drains, levees and other works."

We will not undertake here to detail the provisions of this Act, but refer the Court to it as found in the record (R., pp. 394–404; Laws of Illinois of 1871–2, pp. 356–365). It is only necessary to say that the general scheme of the law was the construction and *maintenance* of a levee by special and rateable compulsory assessments upon the lands benefited (See, especially, Sec. 39, R., p. 403, as quoted on page 5 of the Petition for Writ of *Certiorari*). Under this Act there was organized what purported to be a drainage district known as the Sny Island Levee District, embracing about 110,000 acres of land on the east side of the Mississippi River in the counties of Pike, Adams and Calhoun, in Illinois. The purpose of the organization, as stated in the petition filed by certain land owners in the County Court of Pike County, was "for the purpose of constructing a levee," and of "*repairing, enlarging, protecting and maintaining* said proposed levee" (R., p 445). This levee, as shown in the proceedings, is about 52 miles in length, and was to be constructed, *repaired and maintained* to protect the lands in the district from overflow by the waters of the Mississippi River. No other purpose is stated in the proceedings in said County Court.

II. In accordance with the order of said county court, the commissioners of the district issued in 1872 certain so-called bonds, signed by the commissioners in their official capacity, to the amount of about $500,000. A contract was entered into with certain contractors for the construction of the levee, and under said contract the contractors were to accept the bonds of the district in payment for their work, at the rate of 90 cents on the face value of the bonds (R., p. 366 & p. 80), *after* each section was constructed. The record shows that the bonds were so delivered to these contractors and by them disposed of. A certain number of them, amounting to $202,-

000 became the property of Mr. Francis Palms, the original complainant in the cause to which it is sought to connect the present action.

In 1875 other bonds to the amount of $148,500 were issued, and they were all taken by the contractors who constructed the levee, and subsequently became the property of Mr. Palms.

III. In 1872 an assessment was made, under the orders of the said county court of Pike County, upon the several tracts of land in the district, purporting to represent the estimated benefits conferred upon the several tracts from the construction and maintenance of said levee; and the first issue of bonds was based upon this assessment.

A similar assessment was made in 1875, and bonds to the amount of $148,500 issued thereon and likewise delivered to the contractors.

IV. The commissioners of the district pursued the regular course marked out by the Act of 1871 to secure payment of said assessments, applying in 1873 to the county court of Pike County for judgment against those tracts upon which assessments had not been paid. Certain of the owners of lands in the district resisted payment, more especially those in the lower part of it, who at all times had consistently maintained that their lands would not be benefited by the proposed work, owing to the fact, as claimed by them, that the waters of the Mississippi River came in around the lower end of the levee and inundated their lands by backwater to almost the same extent as though the river flowed directly across them. These land owners, including one Webster, filed objections to the rendition of judgment against their lands for said assess-

ments, and the matter was contested in the county court of Pike County where judgment was rendered against the lands. From the judgment of that court the case was appealed to the Circuit Court of the county, where the judgment of the County Court was affirmed, and thence appealed to the Supreme Court of the State of Illinois, where the title of the case was Webster *et al.* vs. The People. The commissioners of the district and the land owners generally sought to enforce the assessments by every means known to the law, and, as stated by the bill filed in this cause, when an adverse decision had been rendered even sought a rehearing; but the Supreme Court decided in favor of Webster and other parties resisting the assessments. Another cause was pending in the Supreme Court at the same time, arising under the same law and involving the same questions, which is known as Updike vs. Wright, reported in 81 Ill., 49. In this cause the court rendered an opinion which held in substance as follows:

1st. That the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within the provisions of the Statute of April 24, 1871, and said proceeding is therefore without authority of enabling law.

2nd. That Article 4, Section 31, of the Constitution of 1870, which is as follows: "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains or ditches for agricultural or sanitary purposes across the lands of others," does not authorize the construction of a levee independent of drainage.

3rd. That Section 9, Article 9, of the Constitution of 1870, authorizing the General Assembly to vest the corporate authority of cities, towns and villages, with the power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, is a limitation of the power of the Legislature, and the General Assembly can vest such power to

make local improvements by special assessments or special taxation *only* upon the municipal authorities therein named, and had no power to confer such authority upon any other bodies, and conferred no power upon the drainage commissioners in said cause; and that therefore said assessments and bonds are void.

4TH. That the burden of taxation or special assessments cannot be imposed upon a locality without the consent of the taxpayers to be affected. The owners of such lands must have the right of election in such matters.

No opinion was rendered by the Supreme Court of Illinois in the Webster case; but in the order of the Court it is stated that the decision is based upon the questions raised and discussed in the Updike case, and "that for the reasons there given, the judgment in this cause will be reversed," etc., (R., p. 459). These cases were decided at the January Term of the Supreme Court of Illinois, 1876.

V. It is clearly established by the evidence that the original levee was never protective, was a mere trap, and that it broke and was in many places washed away during the first high water to which it was subjected (R., pp. 91, 115, 116, 227–236, 227, 228, 238–242, 131, 313, etc.

Under the stimulus of the Act of 1871, and the hope of ultimate reclamation of the lands, their selling price had materially advanced until the decision of the Supreme Court in the Updike and Webster cases, and the numerous breaks in the levee which occurred in 1876. In the period from the beginning of the construction of the levee in the winter of 1872-3 until 1876, great changes had occurred within the district. Farms had been opened up, houses built, fences constructed, and a hardworking and industrious people were rapidly filling the region with American homes and all that

they imply. About the 14th day of May, 1876, the levee broke in many places and the Mississippi River poured in a resistless flood over all the lands in the district—the lands which the levee was intended to protect. When the floods came, houses, outbuildings and fences were washed away; crops were destroyed, stock was drowned, people were rendered homeless and gathered in tents upon the adjacent hills. The supposed benefits to the lands at once disappeared, and they returned practically to the same condition that existed before the scheme of protection was undertaken. **The losses of the land owners greatly exceeded the value of the land, and were many times greater than the cost of the levee.** See tes. of Hon. Scott Wike, R., pp. 335–7; of Hon. A. C. Matthews, p. 332–3, and others, p. 119–121, 154, 169, 171, 183, 163, 150, 146, 205, 164, 157, 158, 116, 246, 261, 313, 295, 146, 141, etc.

VI. The decision of the Supreme Court of Illinois in the Webster case was known to all of the people in the district, the case having been appealed from the county in which the greater part of the lands in the district lie. The people believed, and had a right to believe, that the law under which the enterprise had been undertaken had been completely overturned, and that no means remained under the law of repairing the levee or of retrieving their misfortunes. They relied upon the decision in that case as a rule of law and property governing their interests in the district (R., pp. 338, 334, 292, 340, 293, 294, etc.).

VII. In this state of affairs, the people, finding themselves without any authority of law for the repair and maintenance of the levee, by a system of special compulsory assessments

or otherwise, and having in many instances their entirely earthly possessions embarked in the enterprise, some of them contributed money and voluntary labor toward repairing the breaks in the levee, and about one-third of the lands in the district were put into a trust deed from which it was proposed to raise about $30,000 for the repair of the levee. This was a merely temporary and ineffective matter, which they hoped might protect them until some more permanent means of relief could be obtained.

In 1878, through the instrumentality of some of the owners of land in this district, and of others in various parts of the State similarly situated, an amendment to the constitution of Illinois was submitted to a vote of the people and adopted in that year, giving to the General Assembly of Illinois the power to pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary and mining purposes across the lands of others and to provide for the organization of drainage districts, etc. (1 S. & C., Ill. Stat., p. 122).

On May 29, 1879, the Legislature of Illinois, under the above constitutional provision, passed an Act, entitled "An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." (1 S. & C. Ill. Stat., p. 919). Under this Act a drainage district was organized in 1880 with power to levy special assessments to build or repair a levee. This district embraced about 90,000 acres of land, which had been a part of the original Sny Levee District, which comprised 110,000 acres. This organization levied assessments from time to time upon the lands in the district, which most of the landowners paid, and at the time when the testimony in this case was taken in 1893 about $500,000 had been collected since 1876 from voluntary contributions and special assessments, and expended in relocating, repairing and

building the levee (R., P. 224–5). The new levee was located in general on the line of the former one; but there are between three and four miles of the present structure having an entirely different location from the old one. The United States Government purchased certain right of way for the new levee, and expended large sums in its construction and repair (R., p. 224–5), and for this purpose appropriated considerable sums from time to time. Moreover, three railroads whose embankments are in part used by the drainage district furnish about three miles of the levee system (R., p. 77 and 224).

VIII. On the 4th day of May, 1878, Francis Palms, of Detroit, Mich., as the owner of certain bonds of the district (certain other holders of bonds joining with him) filed a bill in the United States Circuit Court for the Southern District of Illinois against Wheelock, Jones and Westlake in their official capacity as commissioners of the old Sny Levee District (R., p. 9). The bill sought through these commissioners to enforce and collect the original assessments of 1872 and 1875 *as such*. Not one of the land owners was made a defendant. On March 13, 1879, the court referred the cause to a Master to take evidence as to the "*principal* and interest on account of such loans," etc., and ordered that, after the coming in of the Master's report as to the amounts found due, "the said complainants or other persons have the liberty to exhibit and file their supplemental bill or bills against any or all of the present or future owners of said lands alleged in said bill to be benefited by said levee and other works," etc., * * * "and the said complainants are at liberty to use the names of the defendants [the old levee commissioners] in any such proceedings by way of supplemental bill, if they are advised that it is necessary to do so," etc. (R., pp. 437-8).

The Master's report of July 7th, 1880, as stated in the order of that date, finds the total amount of interest due and

unpaid to all the parties then complainants in the case to be $304,908.26, and the amount of interest then due to the complainant Palms $221,228.26, and the privilege, granted in the former order, was repeated, that the "complainants have the right and liberty to proceed in this Court in the name of said defendants as complainants, as such commissioners, or in their own name as complainants, against the lands described in said Exhibit 'A,' and the owners thereof," etc. (R., pp. 439-441).

Meanwhile, the levee had again broken in the month of June, 1880, before the work under the new organization was undertaken, and again it gave way in the spring and fall of 1881, before the new levee was completed, sweeping away all crops and many fences and buildings (R., pp. 116-119, 221-223). Mr. Palms did not then avail himself of the permission granted him by Judge Drummond to file a bil against the land owners, and did nothing more in the case during his lifetime. His death occurred November 20th, 1886, and he attended to his own business entirely up to the day of his death ((R., p. 373).

The levee again broke in 1888, and crops and houses were again swept away (R., pp. 119-116, 121-123). And still the representatives of Mr. Palms did nothing toward asserting their rights against the lands in the district until after the land owners had imposed upon themselves the burden of an additional assessment of $100,000 for the further repair of the levee (R., p.).

It was not until April 22, 1889, that the present bill was filed by the representatives of Mr. Palms against the owners of, or parties interested in, the several tracts of land in the district, having waited until the land owners had expended at least $450,000 in the repair of the levee. A hearing was reached in the Circuit Court on November 8, 1895, and a decree was entered dismissing the bill on February 10, 1897 (R., p. 474). From this decree complainants prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh

Circuit, where the cause was heard June 7th and 8th, 1898, before Mr. Justice HARLAN, of this Court, and Circuit Judges WOODS and SHOWALTER. The opinion in the cause was delivered by Mr. Justice HARLAN, and on the 6th day of June, 1899 (after the death of Judge SHOWALTER), an order was entered affirming the decree of the lower court. A petition for rehearing was presented by complainants and overruled on the day of February, 1900, no opinion having been filed at that time.

IX. The laches of complainants and of Frances Palms.

The first and all-sufficient reason which we urge against the granting of the writ of *certiorari* in this cause is, that complainants are clearly barred of any equitable relief both on account of their own laches and the laches of Mr. Palms, whom they represent. As the Court will see from the above statement the litigation in regard to these assessments has been in progress since the organization of the district in 1872—28 YEARS—and that concerning the very bonds now in controversy has continued in some of its forms since May 4, 1878. Mr. Palms had notice of the very beginning of the litigation opposing the collection of assessments, for it appears from the evidence of complainant O'Brien that Mr. Palms sent one John Atkinson, an attorney of Detroit, Mich., to Illinois to investigate as to the validity of the bonds in question, which he contemplated purchasing from the contractors (R., p. 371); and the opinion of Col. Atkinson, so obtained by him (but addressed to John Heffron, Esq., one of the bondsmen for the contractors), showed that: "July 22, 1871 [1872], the commissioners filed the assessment roll, and ask for its confirmation. Two appeals were taken, as appears by the files, *and are undetermined*" (R., p. 457). It would

therefore seem highly inequitable that defendants should be further harassed with this litigation. We insist that this record shows petitioners are clearly barred. The petition seeks to excuse the delay of Mr. Palms and complainants in availing themselves of the privilege granted by Judge DRUMMOND in 1879, of filing a supplemental bill and bringing the land owners into court, by insisting that a large part of the bonds were not then due. A quite sufficient answer to this contention is that Mr. Palms and his eminent counsel certainly considered that he was entitled to equitable relief when he filed his original bill in 1878. If Mr. Palms might have delayed the bringing of any action until the principal of his bonds matured, *he did not do so.* His interest to the amount of some $221,000 was due, and he elected to bring an action. In doing so he came under a duty to prosecute with diligence. In that bill he asked for "an accounting for the *moneys advanced* by complainant to said Commissioners as aforesaid and interest thereon" (R., pp. 13, 427); and made the following a part of his prayer: "And when the amount due to your orator for *principal and interest* as aforesaid is well ascertained, may it please Your Honors to order and declare that your orator is entitled to a lien upon the said level," etc. (R., p. 428). In the decretal order of March 13, 1879, leave was given "the complainants * * * to go before the Master and produce their said bonds and coupons and interest thereon, and make proof of the amount due them of *principal and interest* on account of such loan," etc. (R., p. 437).

The petition undertakes to give another reason for the long delay, which is as follows: "*In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners were expending money in repairing*, and it would have been unreasonable for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due" (R., pp. 45-6). Here we find the real reason for this long delay. Mr. Palms *knew* that "there

were extensive breaks in the levee in 1880, followed by more in 1881;" he knew that the "land owners were spending money in repairing" these breaks; he knew, as averred in his bill, that these lands were not worth to exceed fifty cents an acre (or a total of about $50,000) and were wholly inadequate security for his bonds, unless a good and sufficient levee were constructed (R, p. 42).

The question has been treated as one of laches. But the fact is it was not laches but a deliberate lying by until the unwary land owners should have, by a new and valid proceeding and by new assessments upon their lands, made the complainants' security good. The petition has with most admirable frankness told us, as above cited, the cause for this long delay, which was not oversight nor neglect. The admission is that the filing of the bill was *purposely* delayed until the land owners should by fresh contribution have restored the levee, and so make good the complainants' security.

If we turn now to page 2 of the petition, we find this: "It has remained unbroken since 1888, and has grown as solid and secure as a natural embankment." The present complainants might have proceeded soon after the death of Mr. Palms in 1886, but they waited until after the break in the levee of 1888, and until the land owners had imposed the burden of an additional assessment of $100,000 upon their lands to repair those breaks, which would further tend to enhance the value of their securities, if they should be held valid. These expenditures would doubtless never have been made if Mr. Palms had filed his supplemental bill when he had permission to do so. It is not a case of a sleepy eye, either on the part of Mr. Palms or the present complainants, but of watchfulness for an advantage. If there were no other reason the petition should be denied. These defendants have a right to think that the finality of the judgment of the Circuit Court of Appeals should be recognized.

In so far as this suit affects the original commissioners made parties defendant in 1878, it is barred by laches in failing diligently to prosecute a suit already instituted, as in Johnson vs. Standard Mining Co., 148 U. S., 370. In so far as all the other present defendants are concerned it is barred by failure to *institute* a suit, for no suit was instituted against the land owners until April 22d, 1889.

The cases upon this subject are collected in Galligher vs, Cadwell, 145 U. S., pp. 372–3, from which it appears that this Court has frequently denied relief on the ground of laches for delay varying from two to seven years.

It is true that Mr. Justice HARLAN did not base his opinion in the case at bar directly upon the ground of laches; but he says: "He [Mr. Palms] was given leave to file a bill by an order entered in 1879, but he died in 1886 without availing himself of the privilege so given, although a large amount of interest was then due, and although almost $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land-owners that the Court of equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate because it is provided by Statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the decree which becomes a lien, except upon the renewal of the same by *scire facias*, and that an action to recover real estate shall be barred by seven years' adverse possession under color of title and payment of taxes, or as to unoccupied land by seven years' payment of taxes under color of title (See S. & C. Ill. Stat., C. 77; Sec. 6; C. 83, Secs. 4, 6 & 7, pp. 1386, 1538, 1547," etc.).

Counsel in his brief says (p. 46) : " During the period between the decree of 1880 and the filing of the bill no such changes in the title of the lands have occurred that defendants will suffer great injury if assessments are now enforced" * * * " They did so at their peril. The acts of estoppel are almost all proven by matters of record." As a matter of fact, a very large part of the lands in the district have changed hands in that period, and counsel seeks to bind all of them by notice of the original suit in this case " as a matter of record." We have seen, as stated by Mr. Justice HARLAN, that by the Statute of Illinois no such " notice by matter of record " existed in this case at the time the present bill of revivor, or supplemental bill, was filed. But the present bill tells us that a number of the present defendants " acquired portions of said lands from those who owned them at the time the first levee district was formed " (R., p.).

It will clearly appear to the Court from the record in this case, and perhaps sufficiently from the citations above made, that the enterprise was of a hazardous nature, both to the owners of lands and the parties who purchased bonds of the contractors having charge of the construction of the levee. Mr. Palms not only obtained a concession of ten per cent. from the face of the bonds, in making his purchase, but was to receive ten per cent. interest upon their full face value, and he sent his attorney to Illinois to investigate whether he could take the chances even on these very liberal terms. On the part of the landowners the enterprise had also its hazards. It is said by this Court in Johnson vs. Standard Mining Co., 148 U. S., 370, in substance, that courts look with disfavor upon claims of those who have lain idle while waiting the development of property by the courage and energy, and at the expense of others; and in that case relief was denied to the complainant after a delay of about two years. This principle appeals with striking force to the claim of complainants. Mr. Palms knew the risks of the enterprise, and the struggle that

was going on to reclaim these lands, and having rested upon his rights with such knowledge for the period of about nine years, we earnestly insist that not only the provisions of positive law, but that every consideration of justice and equity, demand that he or his representatives should not now be permitted to enforce his claims against those by whose energy, courage and expenditure the lands have attained whatever value they now possess.

Moreover, the conduct of Mr. Palms was such as to induce any owners of lands in the district who knew of his claims to believe that they had been abandoned, and lands were bought and sold by many persons with such belief (R., p.).

In the opinion of the Circuit Court of Appeals, Mr. Justice HARLAN uses the following language: "The proof makes it quite clear that the levee work done under the Act of 1871 would have been substantially without value for the protection of the land owners, but for what they did out of their own means after the break in 1876, and what was done under the new organization which came into existence under the Constitutional amendment of 1878 and the Act of 1879" (p. 32 of Original Opinion).

Practically all the value the lands now have is due to the expenditures of the land owners since 1876. The representatives of Mr. Palms should not be permitted to reap the *only* benefit to be derived from such expenditures. For the total issue of bonds was but a little under $650,000; and the total interest thereon to date would be, approximately, $2,300,000. The bill alleges that the lands when protected by a good levee were worth an average of $25 per acre, or an aggregate for the 90,000 acres in the present drainage district of $2,250,000. The total assessments upon any tract of 160 acres, as shown by Appendix "A" to the petition, is $1,132.80. By the act of 1871 they were to bear 10% interest, and such interest unpaid to the present time would be, approximately, $2,900—a total of over $4,000, or $25 per acre. The record shows that the

lands in the district are not worth on an average the amount as stated by complainants (R., pp. 128–9, 132, 141, 146; but on their own showing they would reap the entire benefit from the protection of the lands if the assessments in question are declared valid liens upon the lands in the district.

We urge these considerations as to laches now because we think they are most appropriately to be considered on the hearing of this application to open the judgment of the Circuit Court of Appeals so as to subject the respondents to many further months of uncertainty and delay.

X. Questions of "Gravity and Importance."

By Par. XLVI. of the Petition (p. 29) it is insisted that the decision of the Circuit Court of Appeals is erroneous, and that there are several questions involved in this litigation of gravity and importance and of general interest upon which the decision of the Circuit Court of Appeals is in conflict with the decision of this Honorable Court, and with numerous decisions of the Federal and State Courts.

Respondents insist that no questions of "Gravity and General Importance" are presented in this cause; and we shall now consider some of the subjects presented by the petition under this head.

We are not acquainted with any statement by this court as to granting the writ of *certiorari* to Circuit Courts of Appeals which materially modifies its position, as stated in American Construction Company vs. Jacksonville Railway Company, 148 U. S., 372.

We see nothing in this case of such "peculiar gravity" as would cause this court to take jurisdiction. On page 47 of the Petition it is said: "The bill is filed *only* to enforce the lien of the *levee assessments*. The validity and amounts thereof are the only questions in the case. On page 2, Par. 4

of the Petition, it is said that "It is not a bill to enforce contributions to, or to collect proportionate amounts of, a *gross* sum, but simply a bill in the nature of a bill of foreclosure to enforce the liens of several and specific assessments," etc. It is, therefore, a case of no more "gravity," so far as the amount is concerned, than if there were a number of suits each involving the assessment upon a separate tract of land. We do not understand that, in any case, the amount involved has alone been sufficient to induce this court to take jurisdiction and grant the writ of *certiorari*, but that the writ has been refused in a number of cases in which the amount involved was greater than in this. There are no questions of "general interest" involved, and no such questions are pointed out in the Petition.

XI. Basis for the decision of the Circuit Court of Appeals.

While the opinion of Mr. Justice HARLAN discusses several principles which might have constituted a sufficient defense, yet the decree of the Circuit Court is affirmed by the Circuit Court of Appeals upon four grounds: "First, the Act of 1871, was repugnant to the Constitution of Illinois of 1870. 2nd. The bonds issued under that Act were void. 3rd. The lands intended to be benefited and protected by the levee district under the Act of 1871 could not be specially assessed by any action taken in conformity with the provisions of that Act. 4th. Nothing was done or said by the owners of the lands so intended to be benefitted and protected that estopped them to dispute the validity of the Act of 1871 and of all that was done under it, or that created any equity in favor of the holders of bonds to have said lands sold to pay any special assessment or the bonds issued to contractors." The first three of these propositions clearly involved only questions of law,

and we do not understand that the petition seeks to combat the position taken by the Circuit Court of Appeals upon those questions. The opinion filed by Mr. Justice HARLAN states the authorities bearing upon the question of the unconstitutionality of the Act of 1871 so fully, and his reasoning is so clear and forcible, that we do not consider it in the least necessary to argue that question, nor to refer to the authorities sustaining the opinion, further than they are cited therein. It is clearly made to appear that the principles in which the Supreme Court of Illinois acted in the Webster and Updike cases had been recognized as the law of Illinois *prior* to the issue of the bonds in question, and that this Court in several cases has distinctly recognized the same principles. We will leave that question without further discussion. It must be assumed that counsel for petitioners is satisfied with the ruling of the Circuit Court of Appeals upon these propositions of law.

XII. The alleged estoppel of certain respondents.

The fourth proposition stated in the opinion of the Circuit Court of Appeals presents mixed questions of fact and law, and it is the finding upon these questions which counsel for petitioners seeks to combat. On pages 30-32 the Petition refers to several facts supposed to be established by the record, which it is insisted are sufficient, in whole or in part, to estop the respondents, or some of them, from denying the unconstitutionality of the Act of 1871. The Circuit Court of Appeals had before it all the authorities now cited by counsel for petitioners, together with all the facts as disclosed by the record, and it passed upon the questions now presented as questions of fact under the law of estoppel as recognized by the courts. In passing upon this question Mr. Justice HARLAN says: "But it is contended that even if the Act of 1871 be

held to be unconstitutional the plaintiffs are entitled to relief as against all the defendants who have received a valuable consideration through the Statute procured by their own consent, or subsequently sanctioned by them, and by which they derived an interest. Some authorities are cited which apparently give support to this view, but when carefully examined they do not, we think, apply to a case in which the *circumstances are so peculiar as those disclosed by the present record.*" The italics are our own. He then proceeds to discuss some of the facts disclosed by the record as follows: "All who had any connection with the passage of the Act of 1871, or who desired its passage, acted, as we may assume, in good faith and in the firm belief that its provisions were not inconsistent with the constitution of the State. It cannot be said that any one was guilty of fraud. No assurances of an affirmative character were given by the land owners to those who constructed the work or to those who like Palms, purchased the bonds after they were executed and delivered to the contractors. The land owners, the contractors and the purchasers of bonds all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. It is a case of an honest mistake as to the competency of the Legislature to do what it attempted to do, no one being misled by the assurances and representations of others. The entire argument of learned counsel for the plaintiffs on this part of the case leaves out of view or assumes to be of no consequence whatever, the fact borne on the face of the Act of 1871, that what the land owners operating under it had in view was not simply to have a levee district, but to have a sufficient levee which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things it cannot be supposed that any land owners would have become connected with the scheme embodied in the Act of 1871 unless the *maintenance* of the levee by competent legal authority was assured. It is, therefore, unjust to the land owners to say nothing more than

that they assented to the construction of the levee. If they are to be deemed to have assented to anything, it must be further said that they assented to the scheme under which a levee was to be constructed and *maintained* under the authority of law, from time to time, and so as to accomplish the results contemplated by the Legislature. The system devised by the Act of 1871 is to be looked at in its entirety. We cannot put out of view the vital part of it, and hold the land-owners who acted in good faith and who gave no personal assurances or made any representations responsible for the results to others flowing from invalid legislation and the partial execution of the original plan. If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that the Act of 1871 was valid, with equal truth it may be said that the land-owners would never have sought or desired such legislation except in the belief that the levee would be *maintained* by the same authority that constructed it" (pp. 30, 31 of Original Opinion; 37 C. C. A. Rep., p. 309); and again on page 35 it is said: "The bonds were issued without authority of law, and there was nothing in the acts or conduct of the defendants to estop them from alleging the invalidity of the Act of 1871, or which creates an equity in the bondholders to have the benefit of any special assessment made under said act."

The question whether, when an unconstitutional law has been fully executed—has served its whole purpose—the persons who have taken the full contemplated benefit to be derived under such law may set up the invalidity of the law to escape paying for the benefits received, is NOT IN THIS CASE.

The case is this: A law of Illinois was believed by the owners of overflowed lands to authorize the erection of a levee, to protect the lands from overflow, and for its repair and maintenance by ratable legal assessments upon the lands benefited.

Proceedings for the construction of a levee were inaugurated. The contractors who undertook the work, and the persons who purchased the levee bonds, believed, as did certain of the land owners who were favoring the proceedings, that the law authorized the prooceedings and was constitutional. There was no misleading, no fraud, no false representations, no concealment by any one; but an honest, common mistake as to the validity of the law.

In a suit brought by a resisting property owner, the Supreme Court of Illinois decided that the law did not authorize the building of the levee, or, if it did, was unconstitutional. The levee, badly built, went to pieces. By section 39 of the Act of 1871 the power was given "on the suggestion of the commissioner or *any owner or occupant* of land" to make a new assessment to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, protect or *maintain* any drain, ditch, levee or other work constructed thereunder. (R., p. 403).

The efforts of individual co-operation for repairs failed, as they always do. Improvements and crops to the value of hundreds of thousands of dollars were swept away by the flood. The lands became again practically worthless to their owners, and as a security not worth pursuit. The petitioners in their bill declare that without a levee they were worth only 50 cents per acre.

The lands were thrown back substantially to their original state. No benefit whatever was left with the land owners. Their faith in the law and in the levee cost them, in the loss of crops and improvements, many times the cost of the levee. A levee without the power to defend it was only a snare. The power of the Levee Commissioners to make contracts, to protect the levee, was lost, and the Mississippi flood laughs at subscription papers. No sane man would store so much as a rick of hay behind such a levee. The power to assess for defense and repair was of the essence of the law.

Without that power the law conferred no benefit, a
power failed.

The case is wholly different from the cases cited
petitioners. In them the benefit contemplated by the
been fully enjoyed.

There is no conflict of cases to be reconciled here
has never been held anywhere that an unconstituti
could be enforced against any one upon the so-called p
of estoppel, unless the law had been fully executed—u
party to be estopped had received all of the conte
benefits of the law.

There is nothing in this case which places the
Court of Appeals in conflict with the decision of this
the case of Daniels vs. Tierney, 102 U. S., 415.

XIII. Daniels vs. Tierney.

As counsel attaches so much weight to the decisio
court in Daniels vs. Tierney, and cites an isolated
from the opinion rendered in that case, quoting from
son vs. Landrum, 5th of Bush., it seems necessary to ca
tion to it, as briefly as may be.

It appears that the Convention in the State of Vi
April 13, 1861, passed an ordinance entitled "An ordi
provide against the sacrifice of property and to suspe
ceedings in certain cases;" whereby, when a debtor
whom there was an execution in the hands of an office
bond and security for the payment of the debt when t
ation of the ordinance should cease, his property s
restored to him. A few days later the ordinance of s
was passed. Daniels, against whom an execution w
hands of an officer, took advantage of this act, gave a
der it and had his property restored to him. Suit w
mately brought upon this bond, and Daniels pleaded

constitutionality of the Convention under which the bond was issued, and, hence, the invalidity of the bond itself. Judgment having gone against him in the court below, the cause was brought to this Court on writ of error. The Justices being divided as to the question of whether the bond was good as a common-law liability, the decision was placed upon the ground that Daniels was estopped to deny his liability under the peculiar facts of that case. The distinctions of both fact and law between that case and the one at bar seem to be very clear. In the Daniels case the creditor was not to be consulted as to whether the bond should be given or not. In the opinion of the court (p. 419) it is said: "His [the creditor's] assent was not required. So far as he was concerned, the Sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent, were alike immaterial. He was powerless in any event to control the result." And again on page 420 it is said: "If the parties are in *pari delicto*, the law will help neither, but leaves them as it finds them." And the court held that the parties were not in *pari delicto* in that case. In the present case the bonds were not forced upon Mr. Palms.

Another very broad distinction is that the party estopped in the Daniels case had received the full benefit of the law; the *full consideration* which induced his action. His property had been restored to him on the execution of the bond, and he had received precisely the same benefit as though the Convention and bond had been in every respect valid. In the case at bar the respondents had *not* received the consideration which induced their action. That consideration was not the money which Mr. Palms paid to the contractors for certain bonds, which never went into the treasury of the district, and which no land owner ever received in whole or in part; but the consideration which moved *them* was the entire scheme of the Act of 1871, which contemplated not only the construction, but

the *maintenance* of a levee which would protect them from the waters of the Mississippi River, and which should be paid for by a system of assessments which might be lawfully enforced against *all* the lands in the district. This is clear, not only from the provisions of the Act itself, but from the very language of the petition (R., p. 445) which set the machinery of the law into operation, and from the testimony of numerous witnesses (R., pp. 63-4, 114, 115, 121, 129, 133, 149, 153, 277, 238, 238-9). The Daniels case does not apply here.

XIV. The Case of Blake vs. The People.

The petition also seeks to show that the decision of the Circuit Court of Appeals is opposed to that of the Supreme Court of Illinois in the case of Blake vs. the People, 109 Ill., 504. We do not understand that conflicting decisions of State Courts have ever been held sufficient to give this Court jurisdiction of a cause or to warrant it in issuing writ of *certiorari*. The writ was refused by this Court in the case of "*In Re* Woods, Petitioner," 143 U. S., 202, although it appeared that there was a conflict between the position taken by the Circuit Court of Appeals and that of the State Court.

If it be true that the decisions of the state courts are not altogether harmonious as to how far an unconstitutional law may be enforced, this Court has no power to harmonize them—for its decisions have no binding effect upon the state courts. If every case decided in the Circuit Courts of Appeals in which it can be shown that state courts held diverse views as to the questions involved, is to be brought here, it would be nearly equivalent to allowing an appeal in all cases.

But we insist that the decision of the Circuit Court of Appeals in this cause is in no way in conflict with that of the Supreme Court of Illinois in the Blake case. That case arose with reference to certain assessments levied after the constitu-

tional amendment of 1878 and under the Act of 1879 passed thereunder, and was not intended to modify or overrule the decision in the Webster and Updike cases. Incidentally the question was presented whether or not the assessments in question were levied to construct or repair a levee constructed under any law of the State of Illinois—that is, as we understand it, any Act of the Legislature, or, any provision which at any time had been treated or acted upon as a law of Illinois. The citation quoted by counsel in his brief is a mere *dictum* in no way necessary to the decision of the cause which had been decided before that subject was taken up. Just preceding the quotation referred to the Court said, " It would, perhaps, be a sufficient answer to this to say that we cannot take *judicial notice* that the purpose for which the corporation was created was not, in the language of the second Section, ' to keep in repair drains, ditches and levees heretofore constructed under the law of this State,' and whether, in fact, it was or was not, was a question to be raised and determined by proof on the confirmation of the assessment roll, and it consequently now *comes too late*. But, *assuming* the question to be properly before us, it must be decided against appellant." Then follows the quotation given by counsel. The only parties to the proceedings in the Blake case were the Commissioners of the present drainage organization in their official capacity, and the defendant who was resisting payment of the assessment made by *that* organization upon his land. The owners of lands in the district were not before the court, and the question of estoppel was not presented in the case. It is inconceivable that Judge Schofield would have written an opinion, or that the court would have delivered one, intended to have the effect of estopping hundreds of land owners who were not before the court.

But if the above language is not a mere *obiter dictum*, and if the validity of the Act of 1871 was before the court in the Blake case, yet it was sufficient to maintain the validity of the

assessments involved in that case to hold that they were made to repair the old levee, and that that levee was constructed under an Act of the Legislature of the State then purporting to be law. The vital question was the existence of a levee to be repaired, not the validity of the Act under which it was constructed.

XV. The petition also refers to certain other decisions of various State courts, which it is claimed have a bearing upon the law of this case. As heretofore stated, we do not understand that it is the duty or the province of this court to attempt to harmonize what may be supposed to be conflicting decisions of State courts, and will, therefore, not consider those cases in detail. We will, however, remark that in all of the cases referred to, in which parties were held to be estopped from denying the unconstitutionality of an act of the legislature, it clearly appeared from the record that the law had been fully executed, and such parties had received the *full consideration* which purported to be given by the provisions of the law under which they had acted, as in the Pittsburgh and Columbus street improvement cases. In all of these cases the work comtemplated had been completed—the streets, for the improvement of which the assessment had been made, had been improved—and the parties who had asked that the assessments be made, and whose lands were held liable for the assessments in question, had received the full consideration which induced their action. The whole scheme of the law had been executed. There was nothing more to be done under it. It did not fail when half executed, as in this case. There is no case cited in which, for example, the work of paving a street was stopped before its completion by failure of the law under which the improvement was undertaken, such

failure not having been brought about by the parties who sought to secure the improvement. Some of the cases are placed upon the ground of estoppel, some of them on waiver and some on the implied agreement of the assenting land owners; but under whatever name they have been classed, the right to sustain the assessment has been upheld, if at all (in the absence of fraud or misleading statement which has been acted upon), upon the real ground of a fully executed express or implied agreement for which the party sought to be bound has received and retaind the *full consideration* which induced his action. A half-made street, or a half-constructed levee without power of completion and *maintenance* (the law under which it was undertaken having failed) has never been held to be such a consideration as would be the basis of an estoppel, or sufficient to sustain an implied contract.

Some of the cases referred to pursue the doctrine of estoppel to an unreasonable conclusion, as, for instance, in the case of Ferguson vs. Landrum, 5th Bush (Ky.), p. , the Court says, "John B. Robinson advocated the levy of the tax before the County Court, and thereby ratified it, and both he and Grigg (who did not advocate the levy), had either sons or *sons-in-law* who were liable to conscription;" and the conclusion reached by the Court was that said Robinson and Grigg were thereby estopped from denying the unconstitutionality of the Act in question, which was to pay bounties to volunteers, in order to fill the quota and avoid a draft for the Union Army; and the Court held, as a matter of law, that a man is so far benefitted by keeping his *son-in-law* at home that he is thereby estopped from denying the unconstitutionality of an act of the Legislature. This case of Ferguson vs. Landrum was also a case where the law had been fully executed—the entire benefits contemplated had been enjoyed. The exemption from the draft was *complete*. If the proceedings had broken down when only one-third of the draft quota had been filled, or if the commissioners had misappropriated all the

money raised under an unconstitutional law, and no portion of the quota had been filled, would there have been an estoppel? The reasoning of the Court in Daniels vs. Tierney would not apply to a case like that. The Circuit Court of Appeals did not introduce a new rule of decision in the Federal courts. It did not go contrary to Daniels vs. Tierney.

It is a mistake to say that either Judge Drummond or Judge Gresham held otherwise on this question. They did not have the present record before them. But, if they had so held, it would hardly do to urge this as ground for *certiorari*. It would be to say that when a Circuit judge is overruled by the Circuit Court of Appeals this Court must take jurisdiction.

XVI. This Court was without jurisdiction to review this cause, prior to the Act of March 3, 1891, because the several assessments involved are separate and distinct claims, and each under $5,000; and there is no question of such gravity or general importance presented in the petition as changes the general policy of the law on that subject or such as should induce this court to take jurisdiction of this cause.

The ground for giving the Circuit Court of the United States for the Southern District of Illinois original jurisdiction in this cause is the fact that it is between citizens of different States—it being averred in the bill that the complainants are citizens of the State or Michigan, and the defendants citizens of certain other States, chiefly of Illinois. In this class of cases the judgments and decrees of the Circuit Courts of Appeals are final under Sec. 66 of the Act of March 3, 1891; with the exception which makes it "competent" for this court to have any such case certified "for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

As the decree in the court below was against complainants (here as petitioners), the amount in controversy is to be determined from the averments in the petition filed in this court, perhaps supplemented by the averments in the bill.

The bill, it is true, avers that complainants are the owners of so-called bonds issued by the Commissioners of the old Sny Island Levee District to the amount of about $350,000 face value; but it is not the purpose or prayer of the bill to obtain a decree against the old district, or its commissioners, or any party or parties for said sum. The averment as to the amount of these bonds seems to be in the nature of matter of inducement. The assessments made upon the several tracts of land in 1872 and 1875, by the old drainage organization, are the real basis of any equities claimed. In the prayer of the bill the court is asked to decree that "complainants and other holders of bonds are entitled to a first and prior lien upon all the assessments made upon the *several tracts of* land in said bill described," etc. (R., p. 44, 45); that the amount of the bonds may be determined, and "the amount due for principal and interest for the *several* assessments made against and upon *each* tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon *each* tract of land necessary to the payment of the principal and interest now due upon the bonds and coupons of your orators," etc. (R., p. 46).

The Act of 1871, under which the bonds were issued, provided that the commissioners should not be personally liable for the money borrowed, but that the indebtedness should constitute a "lien upon the assessments" (R., p. 402).

On page 2, Sec. IV. of the Petition, it is said: "Complainants' bill seeks to enforce against defendants' lands the *several* assessments levied thereon for the cost of constructing said levee under the provisions of an act of the Legislature of the State of Illinois, hereinafter stated. It is not a bill to enforce contributions

to, or collect proportionate amounts of, *a gross* sum, but simply a bill in the nature of a bill of foreclosure to enforce the liens of *several* and *specific* assessments levied on *several* and *specific* parcels of land upon the faith of which assessments the moneys which built the levee were advanced."

And on page 3 it is further said: "The bill implies the possibility, and the evidence shows, that in some cases the assessments may not be collectible because the land owners in those cases have not by their conduct or acts estopped themselves to deny the invalidity of the Statute. On this account the original bill filed by Mr. Palms listed *separately* in the bound book, 'Exhibit A,' each description of land assessed, the name of the owner and the amount of the assessment."

"In the present bill complainants in Exhibit 'X' list the same descriptions of land, the same assessments thereon, and the names of the owners at the date of the assessment, as in Exhibit 'A,' with the addition of the names of the owners at the time of filing this bill." And on page 47 it is said: "The bill is filed only to enforce the lien of the levee assessments. The validity and amounts thereof are the only questions in the case."

In order to entitle the petitioners to the writ of *certiorari* in this case, it is necessary that the petition should affirmatively show the right to the review sought. The court will not hunt through the record to see whether a case has been made aside from the petition.

Hubbard vs. Todd, 171 U. S., 474.

It then seems clear, both from the original and supplemental bill, as well as from the averments in the petition filed in this court, that the purpose of the bill is not to collect a gross sum, or proportionate shares of such sum, but to enforce the liens of the several and specific assessments described in Exhibit "X."

There are as many separate and distinct controversies as there are separate and distinct tracts of land.

If any or more of the assessments exceed $5,000, it would have given this Court jurisdiction as to such assessment, but not as to others less than that sum. None of the assessments upon any one tract aggregate more than about $1,132, with the exception of two, which appear to be a little in excess of $2,000 (both of which latter seem to be misprints), as stated in "Appendix A" to the petition.

As this is a proceeding against each separate tract of land, and not against the owners of lands personally, it is immaterial how many tracts of land any one defendant may own; but there is no averment in the pleadings showing that any one person owned at the time of the hearing in the court below, or when the bill was filed, enough tracts to give the court jurisdiction, even if it were a proceeding for a personal judgment.

There is no joint interest in the defendants.

The principle is stated in Adams vs. Crittenden, 106 U. S., 576, that "distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction," where the judgment or decree in favor of or against any one party does not exceed $5,000, exclusive of costs.

The same principle is announced in Farmers' Loan and Trust Company vs. Waterman, 106 U. S., 265 (271); in Tupper vs. Wise, 110 U. S., 399, and in numerous other cases, such as

Ballard Paving Co. vs. Mulford, 100 U. S., 147.
Henderson vs. Wadsworth, 115 U. S., 264.
Oliver vs. Alexander, 6 Peters, 143.
Seavers vs. Bigelow, 5 Wal., 208.

The latest case we find is that of Ogden City vs. Armstrong, 168 U S., 224, in which a part of the parties appealed from the assessments upon their several tracts of land, aggregating about $40,000; but, as the assessments against each defendant except one were less than $5,000, the appeal, on motion in this court, was dismissed as to all except the one appellant whose assessment exceeded $5,000.

It is clear, then, that no appeal could have been maintained to this court prior to the Act of 1891 as to such assessments.

There is no averment in the bill of any joint interest of the defendants, nor of any interest in one defendant in several tracts of land, such as would give this court jurisdiction if such interests could be joined. It would seem to be wholly immaterial whether one party owned enough separate tracts of land to reach the aggregate of $5,000 or not, as the averments are that the purpose of the proceeding is to reach each tract of land separately, being in the nature of a proceeding *in rem*. But if this is not the correct view, and if the several tracts which any one person owns could be joined to make up the jurisdictional amount, then the Appendix to the Petition shows but two or three persons the aggregate of whose holdings on the face of the Appendix exceeds that sum.

We understand that this court has interpreted the exception to Sec. 6 of the Act of 1891 as giving it *power* to review any of the cases made final in the Circuit Courts of Appeals, irrespective of the amount involved, when questions of sufficient gravity are presented, and that such power was reserved by the act of 1891 for the purpose of preserving uniformity of decision between the several circuit courts of appeals and this Court; but we do not understand that by said Act or any decision of this court the *general policy* has been changed as to reviewing cases which would not have been reviewable by this court prior to the Act of 1891. The general purpose of the Act was stated in American Construction Co. vs. Jacksonville, etc., Ry. Co., 148 U. S., 372 (referring to the granting of a writ of *certiorari*), that "It has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and *general* importance, or in order to secure uniformity of decision;" and in that case the writ was denied, although involving large property interests. It was granted in the case of Lau Ow Bew,

petitioner, 141 U. S , 583, and 144 U. S., 47, because that case involved personal rights under the Chinese Exclusion Act and the treaties of the United States.

The authorities are collected and reviewed in Forsyth vs. Hammond, 166 U. S., 506, and while the power of this court to grant the writ in such cases is reaffirmed, it is based chiefly upon the necessity of preserving uniformity of decision between the several circuit courts of appeal and this Court, and it is said that "It is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that (1) the importance of the question involved, (2) the necessity of avoiding conflict between two or more courts of appeal, or (3) between courts of appeal and courts of a State, or (4) some matters affecting the interests of this nation in its internal or external relations, demand such exercise." The numerals above inserted are our own. It clearly appears that none of the three causes last named occur in this case. There has been no conflict between two or more courts of appeal, nor between the Judges of one court, nor the Judges of the courts of appeals and the Judges of the circuit court. There has been no conflict between the decisions of the United States Circuit Court or the Circuit Court of Appeals and that of the Supreme Court of Illinois, for the decision of the Supreme Court of Illinois, in a direct appeal involving these identical assessments, is fully affirmed by the United States courts. There is certainly no matter affecting the interests of the nation in its internal or external relations. And, finally, there is no question of "general importance" involved. The only question presented by the Petition is whether some 700 separate tracts of land are subject to certain several assessments specified in the record, made in 1872 and 1875, because the parties then or since owning the lands have done certain acts which estopped them from setting up the invalidity of an Act of the Legislature of Illinois, which has been held unconstitu-

tional both by the State and the United States courts. It is a question of individual assessments and individual estoppels, involving a mass of testimony which would require months to unravel.

It would be putting a premium upon laches to hold that Mr. Palms and his representatives could delay this litigation until the law has been changed which gives this Court power to entertain jurisdiction over it, and then bring it here asking, in effect, that certain general principles of estoppel be established and the cause then referred to a Master to determine which of the defendants come within those general principles (p. 4 of Petition).

We earnestly insist that this is not one of the class of cases which the policy of the law requires should be reviewed by this court.

The petition refers to several other questions in the cause, and argued in the court below, which may not be considered of the first importance upon the questions involved in the hearing; but, as they are presented by the Petition, and to some extent argued, we will state the position of respondents in regard to them, as concisely as may be.

XVII. As to notice to land owners.

By paragraph XXIII. of the Petition filed herein it is asserted that very many, if not all, of the land owners who acquired title to their respective lands since 1872 and 1875 did so with notice of the assessments made in those years. This may be true; but it is further true that those who had such notice also knew of the decisions of the Supreme Court of Illinois in the Updyke and Webster cases declaring those assessments void, and that they relied, and had a right to rely,

upon those decisions as rules of law and property, which protected their lands from the lien of any such assessments.

In this connection we will call the attention of the Court to the fact, established by the evidence, that a very large number of the defendants did not know of the original suit of Palms against the Commissioners of the old district until the present bill was filed in 1889, and summons served on the landowners, and that those who did know of that cause believed, and had good reason to believe, that Mr. Palms had abandoned whatever claims he had ever asserted (292, 340, 293-4).

It is asserted by the Petition (par. X.) that the assessments and orders were recorded in the recorder's offices of the respective counties in the district as required by the Act of 1871, and were, therefore, constructive notice. This is an error. The record shows that the assessments were not so recorded in the respective counties; that they did not appear on abstracts of title, and were not constructive notice—even if the Act of 1871 had been valid—as shown by the testimony of the official recorder and of abstractors of title etc. (R., p. 326, 330, 331).

XVIII. It is not denied, as stated in Par. XIX. of the petition, that, after the decision in the Webster case, and the filing of the original bill by Mr. Palms against the old levee commissioners, certain land owners organized the present Sny Island Levee Drainage District, acting under the constitutional amendment of 1878 and the Act of the Legislature thereunder of 1879; but it is denied that, after the decision in the Webster case, the old commissioners were in possession of the levee in any lawful sense, or that they were in any actual possession except as they permitted, so far as they could permit, certain land owners to repair it for the protection of their crops and lands (R., pp. 247, 68-70, 79, 80, 242). They did not take or hold possession of the levee under the order appointing them receivers (R., p. 68-70, 79, 80, 87, 90, 242, 277).

It is further denied that the old commissioners ever had any lawful right of way for the levee, or surrendered possession of it to the organization of 1880. That organization found a ragged and broken embankment along *a part* of the ground where they proposed to construct a *protective* levee; they could not remove the embankment, and to a certain extent they utilized it, but the testimony of Col. Prince, a capable civil engineer, thoroughly acquainted with the ground, shows that a better and cheaper levee could have been built upon an entirely new location, as matters existed in 1880, than by following the line of the old location in so far as it was followed (Testimony of Col. Prince, R., p. 112 *et seq.*).

XIX. It is asserted in Par. XXV. that all of the defendants who acquired title to their lands since May 4, 1878, are purchasers with notice of Mr. Palms' equities, because his original bill was filed on that day, and that the decrees thereupon of March 13, 1879, and July 7, 1880, were full notice of complainant's equities.

Neither the original bill nor said so-called decrees were "notice" to the present defendants, because they were not parties to that cause, and were not served with process. Moreover, those so-called decrees were in effect merely interlocutory decretal orders, and the Master's report was confirmed with the important qualification that the amounts found due were "without prejudice" (R., p. 440). We understand this to mean without prejudice to the rights of any land owners who might subsequently be made parties.

This court, in the case of Fourniquet vs. Perkins, 16 How., 82, held that orders of this character are interlocutory and may be set aside at a subsequent term. The opinion of Mr. Justice HARLAN contains a quite sufficient answer to this contention. He says (p. 36 of

opinion): "The plaintiffs can take nothing, as against the individual land owners, defendants in this cause, by reason of any order made in the suit instituted by Palms in the Circuit Court of the United States against the Commissioners designated under the Act of 1871; for the present defendant land owners were not parties to that suit, and could not be concluded by any order made in it. It is evident from the orders entered in that case that Judge Drummond did not intend to pass upon the rights of the land owners, but was of the opinion that if Palms had any ground of action against them, in respect of the lands attempted to be specially assessed under the Act of 1871, he must bring them before the Court by supplemental bill."

XX. No notice by lis pendens.

There is no notice in this case by *lis pendens*, for *lis pendens* does not begin until the filing of a bill and service of process thereunder.

Norris vs. Ile, 152 Ill., 202.
Bennet on *Lis Pendens*, p. 153.

It had ceased to be *lis pendens* before the supplemental bill was filed, even as to the original commissioners, Jones, Wheelock and Westlake, because it was not diligently prosecuted.

Herrington vs. McCullom, 73 Ills., 483.
Durand vs. Lord, 115 Ill., 621.
Norris vs. Ile, 152 Ill., 202.
Miller vs. Sherry, 2 Wall., 250.

XXI. As to the answer of respondents.

We do not consider it essential to the proper understanding of the issues presented by the Petition that

we should follow in detail the averments of the Petition in regard to the pleadings and evidence. The answer of respondents is found on page 55-18 to 55-45. It is, perhaps, sufficient to say that the answer gives a general history of the district and litigation ; insists that the Act of 1871 is unconstitutional and the assessments and bonds void ; that respondents are not estopped from setting up such unconstitutionality by any act of theirs, or of any of them ; that complainants are barred by the laches of themselves and of Francis Palms ; denies that a protective levee was ever constructed, but avers that after the breaks in the levee in 1876 the value of the lands was substantially as low as before the enterprise was undertaken ; that respondents were in no way benefited by any advances contributed towards the construction of the levee up to that time ; but on the contrary were in a worse condition than if the enterprise had never been undertaken ; that no bonds were ever sold by the commissioners or any of the defendants to Mr. Palms ; that they received no money from him ; that the bonds in question were delivered to the contractors who constructed the levee in full payment for their work, and by them were disposed of on the market ; and, in addition to the defense of *laches*, very many of them set up defenses under the various limitation laws by possession and payment of taxes for seven years, or by actual residence under color of title, etc., as stated in the Statutes above referred to in the opinion of Mr. Justice Harlan.

Mr. Palms Did Not Rely On Any Acts of Estoppel.

XXII. It is said in the Petition (page 40), that they (the land owners) "held out as an inducement the entire Statute. They asked the money and work of others upon the faith of all the provisions of the Statute, and by their conduct assured contractors and others that they would not attack the validity

of the law in any particular." We insist that the record of this case shows that Mr. Palms relied on the act of 1871 and the proceedings of the County Court of Pike County thereunder; and did not rely upon any assurances coming from land owners, and that the land owners did not "hold out" any inducements to him.

It is said on pages 30-31 of the petition that Wheelock and others "acting for such land owners" authorized the publication of pamphlet A (R., p. 385) which contained the opinions of eminent counsel that the law was constitutional, and the proceedings under it valid, etc. This pamphlet was not published by the Commissioners nor by any of the land owners; but it was published by the contractors who received the bonds for their work and had them to sell (R., p. 249, testimony of Hon. Geo. W. Jones). Moreover, "the opinions of eminent counsel" there published were not opinions obtained by the Commissioners; but were obtained by Mr. Palms himself as shown by the testimony of one of the complainants in this cause (R., p. 371-2). This testimony shows that "he (Mr. Palms) obtained the opinion of several western lawyers with reference to the validity of the bonds. He sent Col. Atkinson to Springfield, and I think he went to the county seat of the county where the work was located, to obtain the details pertaining to the issue of the bonds and for the purpose of learning as to the validity of the bonds. He came back with the report of the details pertaining to the organization and the issuing of bonds and presented an opinion in favor of their validity, which was submitted to George V. N. Lathrop and by him approved before Mr. Palms really invested." These opinions appear on pages 454-8 of the record. It, therefore, clearly and affirmatively appears that Mr. Palms relied "as to the validity of the bonds" upon the investigation and opinion of his own counsel, and *not* upon any act or acts of any of the parties defendant in this cause.

XXIII. Lands purchased "subject to assessments."

On page 40 of the Petition, Par. 3, it is insisted that the Circuit Court of Appeals in its opinion made no allusion to certain defendants who purchased their lands subject to these drainage assessments, and, as it is said, agreed to pay them.

The recitals referred to occur in a few warranty deeds, and amount to an exception from the warranty, as, for instance, "except levee assessments," etc. There was nothing in any of these recitals which contemplated the payment by the grantee of the assessments in question, or which showed that they formed a part of the *consideration* for the purchase; but they were merely referred to for the purpose of relieving the warrantor from any possible obligation on account of his warranty. There is nothing in such recitals to estop the defendants.

Bryan vs. Forsyth, 19 How., 334 (338).
Mehan vs. Forsyth, 24 How., 175 (178).
Lender vs. Kidder, 23 Ill., 49 (52).
Bryan vs. Melton, 125 Ill., 647.
Crawford vs. Nimmons, 180 Ill., 143.

XXIV. Inadequate construction of the levee.

The Petition (page 41, Sec. 4) refers to the statement in the opinion of the Circuit Court of Appeals that, "There was evidence tending to show—indeed, we think the weight of evidence was—that the levee built under the Act of 1871 was not adequately constructed;" and it is insisted that because, as it is claimed, the levee was accepted by the commissioners and their engineer, and the bonds delivered to the contractors, all questions as to the character and sufficiency of the construction of the levee had been conclusively and finally decided, and cannot be set up as a defense to the assessments.

If this were a suit between the petitioners and the drainage district as a corporation, it is possible that the above position might be well taken, and that the corporation would be estopped from asserting the faulty construction of the levee, by way of defense, on account of the acts of its agents. A different case, however, is presented here. This is a suit in equity by the petitioners seeking to charge the several tracts of land owned by respondents with certain sums of money on account of benefits alleged to have accrued to their lands by reason of the construction of a *protective* levee with funds furnished by the petitioners—it being conceded, in effect, that petitioners have no legal claim.

As the basis of such supposed equities, the supplemental bill contains averments that, prior to the construction of the levee in question, the lands were "swampy, wet and subject to overflow by the waters of the Mississippi River, and were of small value, not exceeding an average of fifty (50) cents per acre, and an average assessment of about $6.00 per acre upon said lands * * * greatly exceeded the then market value of said lands;" and that by the use of funds advanced by Mr. Palms and others the value was advanced to an average of about $25 per acre (R., pp. 42-3). In such case it is right and proper, as we insist, that respondents should be permitted to show, as they have done, and as was found by the Circuit Court of Appeals, that the levee which is asserted by petitioners to have been made protective was not, in fact, a protection to the lands of respondents; that they never received any benefit from the same, nor from the funds invested by petitioners in the bonds in question; and that, therefore, the equities based, wholly or in part, upon such supposed benefits, are without foundation.

As to a Common Source of Title.

XXV. On page 46 of the ~~opinion~~ Petition (Par. 6) it seems to be insisted that the respondents claim from a common source of title with petitioners, and, therefore, cannot set up the defense of adverse possession with payment of taxes for seven years, etc., and it is said that no adverse possession can begin to run against one who has no right to recover possession.

We respectfully submit that there is no "common source of title" shown in this record between petitioners and respondents.

XXVI. As to Adverse Possession, etc.

The record shows that any land owners who knew of the claims of Mr. Palms or other bondholders have consistently and at all times denied such claim and refused to recognize the lien of the old levee assessments since the decision of the Supreme Court of Illinois in the Updike and Webster cases in 1876. Under such circumstances any party in the possession of land having a deed regular on its face, may rely on such deed as color of title, and such color of title, taken in connection with payment of taxes and possession for seven years, forms a complete bar. This defense may be made as well in a proceeding in equity as in one at law.

Hinckley vs. Greene, 52 Ill., 223 (228).
Chickory vs. Failes, 26 Ill., 507 (520).

We are not considering the case of a lien in every way valid against land, and properly recorded, of which every subsequent purchaser must take notice; but a case in which the assumed liability is based upon an estoppel *in pais*, and which depends for its validity not upon a recorded assessment roll but upon certain acts and conduct of the various parties who, at one time, owned the lands in question, which must be proved

by evidence *dehors* the record. As to all such matters, the Statutes of limitation may be relied upon as a defense.

XXVII. The cases of Litchfield vs. Ballou and Ætna Ins. Co. vs. Middleport.

The Petition on page 3 insists that the cases of Litchfield vs. Ballou, 114 U. S., 190, and Ætna Ins. Co. vs. Middleport, 124 U. S., 524, are not applicable as showing any defense in this suit. The citations made from these cases by Mr. Justice HARLAN in the opinion of the Circuit Court of Appeals are so appropriate that it is perhaps unnecessary for us to add anything to what is there said. But with reference to the application of the Litchfield case we will call the attention of the Court to the fact disclosed in this record that Mr. Palms' money did not enter into the construction of the levee; that, at most, it went to purchase bonds issued after each section of the levee was constructed; that whatever was expended by the contractors was intermingled with that furnished by hundreds of private individuals, by the new levee and drainage district, by three railroad companies, and at least $50,000 expended by the United States Government. Therefore, neither the money of Mr. Palms (if it had entered into the levee) nor its product could be specifically identified; and no lien could be given for it under the authority of Litchfield vs. Ballou.

Subrogation.

As to the application of the case of Ætna Insurance Co. vs. Middleport, we will call the attention of the Court to the following facts: In the case at bar no bonds were sold by the commissioners of the drainage district to Francis Palms or to any one representing him (R., p. 372). They were delivered to the contractors who constructed the levee. If the con-

struction of the levee created any equities in any one it was in favor of the contractors who constructed it, and all of these supposed equities existed before Mr. Palms obtained his bonds. Therefore, he cannot assert such equities (assuming that his bonds are not legal obligations) unless he can be subrogated to the rights of said contractors. This he cannot do under the authority of the above case. We insist that it is precisely analogous. In both instances corporations undertook the construction of certain works and employed contractors to do the work. In both cases the contractors were paid by bonds issued by the corporations. In both instances the bonds were held practically void as to the corporations issuing the same. In both, the purchasers of the bonds claimed subrogation to the rights of the contractors from whom the bonds were purchased. It is true that in the present case the bill does not in specific terms claim the right of subrogation; but if we are right in showing, as we have done, that Mr. Palms is, in fact, only seeking to reach equities which originally belonged to the contractors, if they existed at all, then this Court has held in the Middleport case that the purchasers of bonds under such circumstances as are shown in this case, who purchased them in the open market as a matter of speculation and not from any compulsion, acquired no interest which entitled them to be subrogated or placed in the shoes of the contractors. Mr. Palms is in this case a mere volunteer, and we insist that under the authority in that case he had no standing in the Circuit Court.

While the opinion of the circuit court of appeals refers favorably to the above cases, the decision is not based upon them; yet it seems clear that they furnish an additional ground of defense, should such be necessary.

Conclusion.

Almost a generation has passed since this litigation commenced. As the years went by and Mr. Palms continued as silent as the tomb the land owners believed, and had a right to believe, that he had completely abandoned the levee and all things connected with it. But for the land owners every vestige of the old levee would have been washed away. While he was sleeping or waiting for them to make his security valuable, they were building up their homes and setting up their household goods. Roads were constructed, fences built, fields broken, and, in fact, all the appliances of an industrial community were being established. When the few who had ever heard of Mr. Palms' original bill had forgotten all about it; when Mr. Palms' own conduct gave to the community the strongest assurance that can be given by mere conduct, that he had entirely abandoned his supposed cause of action, his executors step forward with a new bill, pretending to call it a bill of revivor—*thirteen years* after the decision of the Supreme Court of Illinois that the assessments in question were void, and *nine years* after he was granted permission to proceed against the land owners, and then, for the first time, make them parties to the litigation.

In the meanwhile, the owners of the land had changed greatly. The years were doing their work. Sales and mortgages, incumbrances and transfers were going on from week to week, and the currents of life and death were proceeding as they always will proceed. Through it all the people were struggling to save their property, and still Mr. Palms paid no attention to this suit or the district. When, years afterward, the law and the constitution had been changed at great expense to meet the new conditions—when by such means the land owners had produced a new mode of protection for themselves and new value had

been given to the property—Mr. Palms' executors come in with a new bill against new parties. We maintain that before this last bill was filed Mr. Palms had in law and equity abandoned the lands and levee, and all claims that he had against the land owners and their property.

He remained silent when he should have spoken, and with the very purpose, as the Petition states, to allow the respondents to make fresh expenditures upon the property; and now he or his executors cannot be heard to speak when they ought to remain silent.

We earnestly insist that this litigation which has continued for about a quarter of a century, in various forms, should cease, and that by every principle of equity this Court should deny the Petition for a writ of *certiorari*.

Respectfully submitted,

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Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1900.

MICHAEL W. O'BRIEN ET AL., EXECUTORS, ETC.,
Complainants and Petitioners.
vs.
JOHN G. WHEELOCK, ET AL., *Respondents.*
No. 241

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT AND BRIEF FOR RESPONDENTS.

I.

May it Please the Court:

Under the rules of this court, as we understand them, it is necessary that a statement of the facts of the case be given by the counsel for petitioners, and counsel for respondents are required to point out any omissions or incorrect paragraphs in the statement so made on behalf of petitioners, which are deemed of sufficient importance for notice.

In this case a statement has been made by counsel for petitioners which is in the main correct so far as it goes. But some mistakes have crept into the statement, and elements of some importance have been omitted therefrom. No doubt all this was done through inadvertence. And, indeed, this is not to be wondered at, in view of the immensity of the record and the many facts, dates and propositions of law necessary to be set forth. A large part of the statement for petitioners is taken up with the analysis of the bill of complainants. We desire carefully to distinguish between the mere averments of the bill and the facts as established by the evidence.

We may, perhaps, be pardoned if we incidentally repeat a small part of what has been said in the statement for petitioners. The bill upon which the present action is based is called on its face at the outset an original bill in the nature of a supplemental bill and bill of review, and was filed April 22, 1889, by the executors of the last will and testament of Francis Palms, deceased, vs. John G. Wheelock and George W. Jones, formerly commissioners of the Sny Island Levee District, organized under the act of 1871; also against about eight hundred or a thousand parties who were the owners of, or interested in, lands in said district, and also against the Sny Island Levee Drainage District, a corporation organized under the orders of the County Court of Pike County, Illinois, in 1880, after the constitutional amendment and legislation thereunder, which will be hereafter referred to. Counsel for petitioners, in his brief, refers to this

bill as one of supplement and *revivor*,and treats it as such throughout. We shall, therefore, consider that the statement on the face of the bill, that it is a bill of review, is an inadvertence. The bill purports to be supplemental to a bill filed by Francis Palms in his lifetime, on the 4th day of May, 1878, (Trans. p. 410). Its purpose is to collect certain bonds owned by said Palms, and the interest thereon, by the enforcement of certain assessments against the lands in said district, levied by the orders of the County Court of Pike County, Illinois, under the provisions of the Act of April 24, 1871, hereafter to be fully considered.

We will assume that counsel for petitioners has given a sufficient analysis of the averments of his bill in the brief filed herein, and we will not repeat those averments; but we desire to call the attention of the court to the fact that this analysis is of the bill as *amended*,and not as originally filed, and not as it stood when the demurrer hereafter referred to was argued and determined. The amendments to the bill appear on pages 47 to 51 inclusive, and were not made until the day that the cause was heard in the Circuit Court on the 5th day of November, 1895, long after answers had been filed and the testimony taken in the cause, as appears by the certificate of the Clerk of the Circuit Court dated May 25, 1898. (Trans. p. ———).

It is said on page.....that "The levee has, during and since its construction, been at all times in the possession of defendants and their ancestors and assigns through commissioners of their own choosing." We do not think this

a strictly correct statement. The testimony of Messrs. Wheelock and Jones shows that they did not consider that they had any legal authority over the levee after the decision of the Supreme Court of Illinois at the January Term, 1876, holding the Act of 1871 unconstitutional; and that whatever they did with reference to the repairs of the levee thereafter was in a private capacity, representing themselves and certain land owners. (Trans. p. 69, 79-80.)

Counsel for petitioners seems to concede that the Act of 1871 was unconstitutional, and that he must rely solely upon estoppel as the basis for his case, by the following language: "The bill implies the possibility, and the evidence shows, that some of the assessments may not be collectible, because the land owners in those cases have not by their conduct or acts estopped themselves to deny the validity of the Statute." (P. 2.)

THE ACT OF APRIL 24, 1871.

The Act of April 24, 1871, is referred to but not fully abstracted in the brief of counsel; and a part of it is summarized in the opinion of the Circuit of Appeals, Trans. pages 511 to 517. It is printed in full in the Transcript, pages 394 to 404. We will refer, briefly, to a few of the provisions of the Act. It relates only to drains and ditches, as the primary consideration, and not to levees, except as an aid to drainage. Section 1 provides that whenever *one* or more owners or occupants of lands desire to construct a *drain or drains, ditch or ditches*, across the lands of others

for agricultural or sanitary purposes, that the person or persons may file a petition in the County Court of the county in which the drains or ditches shall be proposed to be constructed, and that if it shall be deemed necessary for the *drainage* of the lands of such petitioners that a levee or other work be constructed, the petitioners shall so state and set forth a general description of the same.

This Act was drawn in an attempt to meet the requirements of Article 4, Section 31, of the Constitution of 1870, providing that the General Assembly might pass laws permitting the owners or occupants of lands "to construct *drains and ditches* for agricultural and sanitary purposes across the lands of others."

1 Starr & C. An. Stat., 2d Ed. p. 139.

It should be noted that under this Act any one person, whether an owner or a mere "occupant" of lands might set the whole machinery of the law in operation, and that no personal notice was required; but all the notices specified in the Act were to be given by publication and posting. (Trans. 394, Secs. 1 and 2, etc.) Other provisions of this Act will be referred to in other parts of this statement and brief.

ACT OF APRIL 19, 1872.

This Act provides for the registration of bonds issued by the Drainage Districts organized under the act of 1871, and appears in the Transcript at pages 405 and 406. We have already called attention to Section 3 of this

Act, relating to the method of collecting assessments, as state and county taxes are collected.

AS TO THE STATEMENT OF FACTS FOR PETITIONERS.

The statement of facts contained in the brief for petitioners is very meager, in view of the immense record here presented. The record embraces not only the printed volume, covering some 550 pages, but a large number of original documents and exhibits, and of copies of records, which were submitted to the Circuit Court of Appeals in their original form by order of the Circuit Court.

It is stated in the brief of counsel that "certain appeals were taken from these assessments" (made by the jury in the County Court of Pike County), "and all the others were confirmed." These are doubtless the appeals referred to by Col. Atkinson in his opinion obtained for Mr. Palms. (Trans. pp. 371-2 and 457).

It is further said, (p. 11) that "the court directed that the assessments be paid in ten annual installments, commencing in 1882, with interest from the first day of October, 1872. Certified copies of said order for Pike, Adams and Calhoun Counties were made by the commissioners and were recorded in said counties on or before December, 1872." This statement is not sustained by the evidence. It is true that the Act of 1871 provided (Sec. 28, Trans., p. 400) that a copy of the assessment roll of the assessments made under direction of the County Court, should be recorded in the

several counties in which the lands were situated. But the evidence shows that this was not done, at least as to the counties of Adams and Pike. The testimony of George W. Archer, Circuit Clerk and Recorder of Pike County, shows that no such record exists, or has ever existed, in Pike County (Trans. 326), and the same appears in the testimony of Messrs. L. A. & E. J. Chamberlain, abstract makers; and such assessment did not appear upon any abstracts of title made in said counties.

It also appears from the testimony of Mr. S. E. Hewes, that no such record exists in Adams County of the assessments made in 1872 and 1874, although the assessments of 1880, under the new drainage organization is found recorded. (Trans. p. 326).

It is further stated that the commissioners acquired the title to the lands required for the site of the levee. This statement is not correct, except as relates to a few instances. The testimony of Col. Clark and Mr. Jones shows that they obtained a right of way for the levee in but few cases; that it was constructed chiefly through wild lands, and that they simply "ran over it." Also, that it was built in several instances on the 16th section, the title to which was in a State for school purposes. (Trans. 90).

It is stated (page 13) that the contractors constructed the levee in accordance with the plans and surveys of the commissioners, and with the approval of the engineer in charge, to such a height that the lands were protected from overflow from the Mississippi river and were rendered healthy

and productive. There is some testimony in the statements of Messrs. Corthell and Parkhurst, engineers in charge of the work under the old levee commissioners, to the effect that the levee was constructed in accordance with the plans and surveys of the commissioners, but there is an overwhelming mass of testimony in the transcript to show that they were mistaken in this respect. Mr. Jones says that the levee never was completed, but was perhaps accepted by the commissioners as though it were completed, because they had no further funds with which to prosecute the work. Trans. pages 81, 82 and 83. The testimony of Mr. Clark, Trans. p. 62, etc.; of Mr. Gay, Trans. p. 278; E. J. Chamberlain, Trans. pp. 214-226; H. P. Dodge, 239-241, and of many others, goes to show the levee was very defectively constructed. But the statement that the levee was constructed to such a height that the lands were protected from overflow by the Mississippi river and were reclaimed and rendered healthy and productive is especially incorrect. As a matter of fact, the levee broke the first time it was subjected to any considerable high water, and when the stage of water was much below that of 1851 and the lands were flooded many times. For the evidence of this we will refer to paragraphs hereafter.

It is also said (p. 14) that the commissioners continued in possession of said levee, and by the use of it protected their own lands and the lands of the other defendants from overflow, etc., and that the commissioners of the Sny Island Levee Drainage District, created in 1880 under the act of 1879, based upon the constitutional amendment of 1878, received

the surrender of the levee from the original Sny Levee commissioners. Both of these statements are incorrect. It is clearly stated in the testimony that the old commissioners exercised no rights of authority over the levee after the decision in the Webster case at the January term of the Supreme Court in 1876; that they merely, on account of their greater acquaintance with the work, acted in their private capacity in assisting certain land owners to make repairs to the levee and prevent it from being damaged. This they did in their private capacity, and as trustees under the trust deed of 1877, which had no reference whatever to the assessments under the Act of 1871. They state that they did not accept the duties supposed to be imposed upon them by the order of the Circuit Court making them receivers of the levee, and well they might say so, for they had not a dollar nor the means of raising a dollar with which to discharge the duties which the court sought to impose upon them and which they never accepted; and they did not undertake to hold and surrender the old levee to the new organization. See testimony of J. G. Wheelock, Trans. 68, 69 and 70; G. W. Jones, Trans. p. 79-80, 87, 90; H P. Dodge, Trans. p. 242; W. H. Gray, Trans. p. 277, etc. Messrs. Jones and Wheelock, former commissioners, state that they considered their rights and duties as commissioners ended with the decisions of the Updike and Webster cases, early in 1876, and the above citations from the testimony show clearly that the commissioners did not exercise any functions *as commissioners*, after the decisions in those cases; but that in their private capacity they acted as trustees under a number of separate trust deeds (only one appearing

in the Transcript), covering in the aggregate less than one-third of the land in the district, and authorizing them to collect a sum not exceeding fifty cents per acre for the reparation of the levee. (Trans. p. 462.) These trust deeds were executed in the nature of a mortgage upon the personal responsibility of the men who made them, and had no reference to the assessments made under the Act of April 24, 1871.

It seems to be fully conceded in the brief (page —) that the Supreme Court of Illinois held the Act of 1871 unconstitutional, as decided in *Updike vs. Wright, 81 Ill. 49*, and *Webster vs. The People*, unreported. (Trans. 459.)

The references to the testimony above made will show that counsel for petitioner is incorrect in stating that in 1880 the Commissioners of the newly created Sny Island Levee Drainage District received the surrender of the levee from the original Sny Levee Commissioners. No such position had been held by the original Commissioners since 1876, and it was not transferred as above stated (Trans. 87-90).

It appears from the statement of counsel, that prior to the filing of the supplemental bill in this case, on April 22, 1889, the bonds of the old drainage district, which had fallen due according to their terms, amounted to fifty thousand dollars in each of the years 1882, 1883, 1884, 1885, 1886, 1887 and 1888, aggregating $350,000, under the original assessment; but it should be added that the interest on the bonds

fell due annually, as well as upon the several assessments, and that assessments were permitted by the Act of 1871 in each year to pay the interest. (Trans. 469-470.)

It is stated that the defendant commissioner, Westlake, died, and no successor was appointed in his place, but that the other defendants, Wheelock and Jones, remained commissioners as aforesaid. It is true that Mr. Jones is still living; Mr. Wheelock was living when the testimony was taken in 1893, but has now been dead for a number of years.

It is stated (page —) that before the construction of said levee, the entire body of lands in the district were wet and swampy and subject to overflows of the Mississippi river, and not worth in valve an average of fifty cents per acre; that while the average assessments per acre greatly exceeded the then market value of said lands, it was expected and promised by the landowners and commissioners that the construction of the said levee, as proposed, would drain said lands and protect them from overflow and render them healthy and productive, and so greatly enhance them in value as to make them ample and desirable security for said assessmens; that complainant's testator, relying upon said representations, was induced to purchase and pay for said bonds, etc. We wish to say that this record contains no evidence whatever of such promises or representations; and that if any such assurances had been made, looking to the future, they would have furnished no basis for estoppel.

It is said that the defendants who acquired title to the lands now claimed by them, since May 4, 1878, are purchasers with notice, on account of the filing of such original bill, and that they also had notice on account of the orders of the Circuit Court in 1879 and 1880. These matters will be fully considered under the subject of "*lis pendens*" in a later part of this brief.

Copies of the bonds of the series of 1872 and of 1875 may be found in the transcript on pages 469-71. It is conceded in the brief for petitioners that these instruments are not bonds in a legal sense (p. 5). They are not negotiable instruments. *N. O. vs. Warner, 175 U. S. 120 (128).*

A chronological reference to some of the more important matters connected with this case may be of assistance to the court.

The litigation commenced in 1872, when the Commissioners filed in the County Court of Pike County their assessment roll, and appeals were taken therefrom. (Trans. p 457.) Certain landowners in the lower part of the district, who claimed that their lands would not in any way be benefited, owing to the backwater which would inundate them by coming around the lower end of the levee in every season of high water, opposed the enterprise from the beginning. Their objections were decided adversely by the County Court of Pike County, and, on appeal, by the Circuit Court of said county. They then took the case to the Supreme Court of the State, where the decisions in the cases of *Updyke vs. Wright, 81 Ill. 49*, and *Webster vs. The People* (unreported,

Trans. p. 459) were rendered at the January term, 1876. In April, 1876, the levee broke and the lands were devastated, as will be hereafter described. On May 4, 1878, Mr. Palms and others filed their original bill in the Circuit Court of the United States for the Southern District of Illinois. On March 13, 1879, (Trans. 437) an order was entered permitting them to bring the landowners into court and test the question of their liability, and the cause was referred to the Master, and on July 7, 1880 (Trans. 438) the Master's report was approved, complainants again given permission to make the landowners parties; and this was the last order taken during the lifetime of Mr. Palms. He died November 24, 1886. His executors obtained leave to file a supplemental bill in January, 1889, and the present bill was filed April 22, 1889. The cause was heard in the Circuit Court in November, 1895, and a decree entered on February 10, 1897, dismissing plaintiff's bill. An appeal was perfected to the Circuit Court of Appeals for the Seventh Circuit, which was heard in June, 1898, and the decision announced in June, 1899.

It will, therefore, be seen that some of the questions involved in this cause have been before the courts in some form for nearly thirty years.

Counsel who have prepared this brief represent those defendants named in the answer of John G. Wheelock et al., which appears in the Transcript on pages 55-18 to 55-45 inclusive, and the answer of the non-resident defendants, represented by same counsel, appears on pages 55-46 to 55-51 inclusive, and the amendment to the answer on pages 55-53 to 55-58.

Without undertaking to abstract said answers or to anticipate the argument, which is to follow, we will say that the more important points upon which respondents rely in this case are, in brief, as follows:

First—That the Act of April 24, 1871, under which all the proceedings were conducted in the County Court of Pike County, referred to in this case, was unconstitutional and void; and hence, all the proceedings thereunder are void.

Second—That there is no estoppel against any of the parties who participated in procuring the enactment of said act, or in taking any of the steps referred to in the County Court of Pike County, Illinois, for the reasons briefly stated, that such parties relied upon (and accepted, so far as any of them accepted) said act of 1871, and all of its provisions as a whole, more especially relying upon that part of the act relating to additional assessments and powers of the commissioners for the repair and maintenance of the levee; that such provisions were the principal considerations which induced any of the land owners to take part in the proceedings, and that none of them would have participated in any way under said act except for the provisions of the act itself in that respect, and that this consideration failed when the Supreme Court of Illinois declared the act unconstitutional, and there was no further power under the act to repair and maintain the levee, which was destroyed by the floods of 1876.

Third—That the appellees were not guilty of any fraud, negligence or misrepresentation whatever, and that appellants in purchasing the bonds relied solely on their own judgment and that of their counsel, and did not rely upon any assurance given by, or acts or silence of, the defendants or any of them. That said defendants were not parties to the bonds in question either as drawers, makers or endorsers, and said instruments are not commercial paper as against them or any of them. That appellees being guilty of no fraud or negligence committed no tort and could only be estopped by entering into an expressed or implied contract with reference to which appellants assumed the position of parties of the other part.

Fourth—That the former orders of court to which reference had been made by appellants' counsel were merely interlocutory and were not final and could not and did not operate upon any of the appellees who were not before the court entering such orders. That such orders on their face purport not to be conclusive but to be "without prejudice." That appellants cannot claim notice to any one under the doctrine of *lis pendens* growing out of the proceedings in the County Court of Pike County or out of the proceedings under the original bill filed against commissioners alone; as the proceedings in Pike County were not a suit and did not require process and no process was issued therein, and the said appellees were not parties to the said first bill filed in the Southern District of Illinois under which said orders were made, nor in privity with any of the parties thereto.

Fifth—The appellants, by failing to prosecute their original suit begun May 4, 1878, (the last order in which was taken July 7, 1880), allowed the same to lapse, even if it ever had any effect as to the present appellees, which it certainly never did.

Sixth—The appellants by their laches in failing to set up and prosecute their alleged equities and to establish their right to a lien on the lands in question for a period of about nine years, during a most extreme crisis affecting all the appellees, lost their alleged rights in equity and in fact estopped themselves from now asserting the same. Many defendants always rely on the several statutes of limitations.

Seventh—That appellants purchased their bonds not from the levee district or the commissioners thereof, but from the contractors who had done the work. That the money of Francis Palms did not build the levee or buy the right-of-way, and that neither he nor his representatives, the present appellants, can be subrogated to any rights which the contractors might have had in law or in equity, and that any appropriation of the levee or the remains thereof by some of the defendants, or by the present district, did not concern the appellants, they having no lien upon, or equity in, said levee.

Eighth—That especially, appellants cannot be heard to set up any claim on the ground of estoppel arising out of events which occurred long after they purchased their bonds.

Ninth—That the supplemental act of 1872, authorizing the bonds to be registered with the Auditor of State, shown in

the Transcript on pages 405 to 406, permitted the bonds to be registered by the Auditor, and, in that event, required that thereafter the assessments upon the property in the district should be extended and collected in the same manner as state and county taxes, and at the same time expressly took away the power of the commissioners to make such a collection. (Section 3, page 405, Trans.) That the bonds were registered with the auditor by the contractors who received them. (Trans. p. 81.) That the law having provided the method for collecting such assessments, the courts are powerless to prescribe or require any other method, and this is especially true as to the Federal Courts.

Tenth—That there being no tort committed by the appellees, the appellants not being deceived or misled, appellants could only acquire a lien, if at all, under the doctrines which control contracts, and would be bound to see that the consideration which induced the appellees to make any expressed or implied promise to submit the lands to the assessments had been duly and substantially received, and as that consideration never was received, and appellees never received that for which they contracted (if they ever contracted for anything) they cannot be held to be estopped to deny their liability.

ADDITIONAL STATEMENT OF FACTS.

In addition to the facts heretofore referred to, either in the brief for petitioners or in our remarks upon the same, we desire to present the following statement of certain facts which we think should be presented at this time.

While the testimony in this record is voluminous, a a large part of it relates to the title and condition of specific tracts of land and the connection of the owners thereof, if any, with the various proceedings described in the bill. Many of the owners show that their losses at the time of the decision of the Webster case and the breaks in the levee, which occurred substantially at the same time, greatly exceeded any benefits which they had at that time, or have since, derived from the same. Many of them also introduced their deeds and tax receipts in evidence, and relied on the Statute of Limitations of the State of Illinois of seven years' adverse possession and payment of taxes under color of title; or seven years of payment of taxes under color of title, as to unoccupied land; or seven years' actual residence on the land under a title deducible of record from the State or the United States. Many show that they had no connection with any of the proceedings referred to in the bill, and many always opposed the scheme. See testimony of A. L. Galloway, p. 293; S. Shewe, 300-301; C. W. Reed, 295, and many others.

I. The first class of defendants, who it is claimed, are estopped from denying the validity of the Act of 1871, are those who participated in "soliciting and procuring the passage" of the act. In his testimony, Col. Clarke says, that for the purpose of procuring the necessary legislation, he consulted counsel, and "worked independent of anybody." He is the only person in this class, (Trans. 62), unless two

or three others are included who contributed small sums toward his expenses. (Trans. p. 59.)

The next class named consists of those who became members of the "Mississippi Levee Drainage Company," a voluntary organization of a few land owners, made after the passage of the Act of 1871, for the purpose of getting its provisions before the people, and of subsequently effecting a legal organization. They contributed very small sums for this purpose, and very few, if any of them, are now living, or own land in the district. (Trans. pp. 59, 62-3.)

The two principal classes of defendants, against whom it is sought to enforce an estoppel, are, first, those persons who signed the petition for the organization of the original Sny Levee District, in 1871, by which the first issue of bonds in question was made, and, second, those who signed the petition for the second assessment, under which the second issue of bonds was made.

The number of names attached to the original petition is 115. (Trans. pp. 442-7.) The testimony shows that a considerable number of these, perhaps 10 or 12, were not land owners, but were mere tenants or "occupants." (See testimony of Massie, Trans. p. ; testimony of Gay, Trans. p. .)

"Exhibit A," which was filed with the original bill, contains copies of the assessment rolls of the district for the years 1871 and 1875, with a description of each tract of land and the name of the owner, if known; if unknown, it is so stated. The

roll of the first assessment (the second in Ex. A) shows the names of 340 separate land owners who were then "known," and there were 373 tracts of land whose owners were then unknown. It therefore appears that the number of owners of land in the district at the beginning of the enterprise was from five to six times greater than the number of those who signed the petition for the organization of the district; and that even the number of those whose names were "known" to the organizers was more than three times greater than the number of those who signed the petition to set the machinery of the law in operation.

The petition for the second assessment is not contained in the printed transcript, but it is a part of the record transmitted to the Circuit Court of Appeals, and thence to this court, and by the stipulation of counsel and order of the court may be referred to by either party. This petition is signed by 52 names, while the number of owners of lands in the district at that time, as shown by said "Exhibit A," is more than *eleven times* greater.

It is not conceivable that one man in five, in the first instance, or one man in eleven, in the second, would have consented to take any steps for the organization of the district except in reliance upon the entire Statute by which, if valid, all the lands in the district might be made to contribute their just proportion not only for the building, but for the maintenance of the levee.

There is no proof in this record that the right of way

for the original levee was obtained in any lawful manner (even had the Act of 1871 been constitutional) by the commissioners of the original district. Col. Clark says that the right of way was bought and conveyed to the commissioners in a few instances and condemned in none. No such deeds have been offered in evidence; they are not on record and cannot be found. Mr. Jones, one of the original commissioners, says that the work was prosecuted over a very unsettled portion of the Mississippi bottom; that there were large tracts unoccupied, whose owners were unknown, and that they simply "ran over it." (Trans. pp. 89-90); that they built the levee through the 16th Section in several places, the title to which was in the State, for school purposes. If the act of 1871 had remained in force, the right of way might have been obtained against any objecting land owner by condemnation; but since the overthrow of the act any parties interested must, on the theory of petitioners' bill, depend upon this matter of consent or estoppel for title to the right of way, and it is evident that non-resident land owners, who knew nothing of the work, and those who gave no consent, and those who resisted, and the State of Illinois itself, would not be bound by estoppel. Therefore, perhaps not more than one man in ten or twenty, whose land was traversed by the levee, would be bound, under the theory of complainants' bill, to permit parties to enter upon the land for the purpose of repairs; and we would have the spectacle of an attempt to keep out the great Mississippi river by levee, one-tenth of which might lawfully be repaired and a nine tenths might not.

The foregoing are the only classes of defendants who took any action in the premises prior to the issue of the bonds in question and their purchase by Mr. Palms, with the exception of those who paid their assessments for the year 1874, and a few also for the year 1875, which assessments, it is alleged, were used to pay the interest due to Mr. Palms and others on the first issue of bonds.

There are other classes of defendants against whom an estoppel is alleged, on account of conduct occurring *after* the purchase of bonds by Mr. Palms. These are the persons who, in 1877, signed certain deeds of trust, embracing about one-third of the lands in the district, by which the owners voluntarily agreed to contribute sums not exceeding fifty cents per acre toward the repair of the levee; those who "participated in procuring" the submission and adoption of the constitutional amendment of 1878 and the passage of the act of May 29, 1879, under the provisions thereof; those who signed the petition for the creation, in 1880, of the present Sny Island Levee Drainage District, and parties who had notice of these various matters.

All of the foregoing classes will be considered somewhat in detail in a subsequent part of this brief, under the subject of "estoppel," in an argument prepared by General Harrison.

II. The inducement and consideration which led the land owners to enter into the enterprise, and to take whatever action some of them took in connection with it, was not

only that the levee should be built, but that it should be perpetually maintained by a system of compulsory assessments on all the lands in the district, as provided in the Act of 1871.

Section 34 of the Act provided that "The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be necessary in and about the surveying, laying out, constructing, *repairing*, altering, enlarging, cleansing, *protecting and maintaining* any drain, ditch, levee, or other work for which they shall have been appointed," etc. (Trans. pp. 401-2.)

Various sections of the Act provided for the levy and collection of assessments for the original construction of the work proposed.

Section 39 (Trans. 403) provided that "Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners, or *any owner or occupant* of lands affected by any work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, *protect or maintain*, any drain, ditch, levee or other work constructed by virtue of this chapter."

In the original petition filed by certain land owners in the County Court of Pike County, (which is relied upon by counsel for appellants as one of the grounds of estoppel) they "ask the appointment of commissioners, in accordance with the provisions of said law," (of 1871) "for the purpose of

constructing *a levee*" * * * "and to do and perform any and all acts as provided in said law, for the surveying, laying out and constructing, altering, *repairing, enlarging, protecting and maintaining* said proposed levee," etc. Trans. 445.

The amendment to the bill (Trans. 48-50), filed after the evidence was taken, avers that the act was published in full in numerous newspapers circulated in the levee district, and that meetings of the land owners were held in numerous prominent places in the district at which the act was read and *all* of its provisions explained by C. N. Clark and others, and by which the land owners were fully informed as to all of its provisions.

The testimony of Hon. C. N. Clark shows that he obtained the signatures to the subscription for the preliminary organization referred to in said amendment, and to the petitions for the organization of the district, that he was present at all of said meetings when said signatures were obtained; that said act was read in all its parts; that the portions of the act providing for the repair and perpetual maintenance of the levee were particularly commented on; that it was well known that such a levee as was proposed would be worthless and a mere trap without the means of perpetual maintenance by a system of compulsory assessments; that the supposed law under which they proposed to act provided for such assessments, repairs and maintenance; that neither he nor any of the other parties would have gone into the enterprise except for such provisions, and that such

provisions and understanding were the principal inducement and consideration which led parties to sign said petitions. (Trans. 63-64 and 114-115.)

The same appears in substance from the testimony of numerous other witnesses: R. M. Murray, page 121; S. M. Spencer, p. 129; E. Petty, p. 133; A. G. Chamberlain, p. 149; W. H. Gay, 153 and 277; J. G. Adams, 238; Hon. Scott Wike, 338-9, et al.

III.—There were no representations made to Mr. Palms by any of the defendants or by any one representing the levee district, which induced him to buy the bonds. The prospectus referred to in the bill relating to the bonds was not published by the commissioners or by their authority, nor by any of the defendants, but by the contractors who received the bonds for their work and had them to sell. Geo. W. Jones' testimony, p. 249; Hon. C. N. Clark, p.....

Mr. Palms sent his own attorney, Col. Atkinson, from Detroit to Illinois to investigate the validity of the bonds. He also obtained the opinion of Judge Trumbull and Hon. G. V. N. Lothrop, and perhaps others, and purchased the bonds relying on the opinions of his own legal counsel, and from parties representing the contractors. See testimony of complainant O'Brien, pp. 371-2.

The opinion of Col. Atkinson appears at pages 454-8 of Trans.; that of Mr. Lothrop at page 458; that of Leonard

Swett 387-389. The opinion of Judge Trumbull does not appear in the printed transcript though offered in evidence by defendants.

The opinion of Col. Atkinson, though addressed to John Heffron, Esq., (the party from whom Mr. Palms bought his bonds), was obtained by Mr. Palms as stated above. (Trans. 371-2.) After a detailed review of the law of 1871 and of the steps leading to the issue of the bonds, he said: "I am of opinion that the bonds are valid," p. 458. Col. Lothrop said: "I fully concur in the foregoing opinion of Col. Atkinson," p. 458. In Col. Atkinson's opinion, after stating that the commissioner had filed the assessment roll and asked for its confirmation, he adds: "Two appeals were taken, as appears by the files, *and are undetermined.*" (Trans. 457.) These are doubtless the appeals of Webster and others. See testimony of Hon. G. W. Jones, p. 82, *et seq.* of Trans. It thus appears that Mr. Palms had notice that the validity of the assessments was questioned, before he purchased the bonds, and that he relied on the opinion of his own counsel.

It is alleged in general terms in the bill that Mr. Palms relied, not only on the validity of the bonds issued under statutory authority, but also on the action and consent of the land owners. We suppose the last statement is made for the purpose of establishing the proposition that Mr. Palms intended to provide two strings to his bow, and had in mind his counsel's theory of estoppel in case the statute should fail. We assert that he relied upon the law and

nothing but the law. This is shown by the opinions of his counsel (which appear in evidence). The learned counsel rendering those opinions do not discuss in a single line the effect of a consent of the land owners, or the doctrine of estoppel, nor do they indicate that such a question was ever submitted to them. There is no proof whatever in the record to sustain the allegation that he relied on anything but the law, and to that extent at least the evidence does not sustain the bill. One of the allegations of the original bill filed by Palms himself is as follows: "Your orator, then and there, relying upon the act of the General Assembly aforesaid, and the proceedings of said County Court and said commissioners, and having full confidence in the integrity and sense of justice of said owners and occupants of the said lands so benefitted and reclaimed by said levee and other works, bought *at par* 162 of said bonds," etc. (Trans. 422.) In his statement as to the second purchase of bonds, (Trans. 425), he says: "And your orator then, as before, relying upon the *legal authority* of said commissioners and the assessments made upon said lands *under said act*, and upon the honesty of the owners and occupants of said lands," etc., purchased the second issue of bonds at par, etc. This original bill, filed when his counsel might consult with Mr. Palms in person, contains no averment of any facts on which an estoppel *in pais* could be based. Now an allegation is made by his executors that he relied on certain acts of the land owners as creating a liability against them by estoppel. We may further remark that the allegation that

he bought from the commissioners at par is absolutely disproved, for he bought of the contractors, or their representatives, and did not pay par, but at most 90 cents on the dollar.

O'Brien, Trans. p. 371-372.
Clark, Trans. p.

IV. The averments in complainants' bill to the effect that a protective levee was built with the money furnished by Francis Palms and other purchasers of bonds, and that the average price of lands in the district was increased from an average of 50 cents per acre to an average of $25.00 per acre by virtue of such work, are not sustained by the evidence. It is established by an overwhelming mass of testimony that the levee as constructed was never protective, was a mere trap, and that it broke during the first high water to which it was subjected. See testimony of G. W. Jones, page 91; C. N. Clark, pages 115-116; E. J. Chamberlain, pages 227-236; Hon. Scott Wike, page 335; Wm. H. Gay, pages 277-8; H. P. Dodge, 238-242; J. W. Brammel, 131; J. H. Brammel, 313, and many others.

It is further shown by the evidence above referred to that the contractors wholly failed to comply with the terms of their contract in the construction of the levee in the following particulars:

(1) They left in many places large logs in the line of the levee, entirely covering them with earth. (2) They failed for a large portion of the levee to plow the ground

before the embankment was placed upon it. (3) In many places large stumps were left standing in the levee and covered with earth. (4) In several localities earth was taken from the land side instead of the river side of the levee. (5) The muck ditch provided for in the specifications, was omitted throughout the greater portion of the levee. All of these defects were sources of weakness and they accounted for many of the more serious breaks which occurred in the levee. See all testimony of S. M. Little, transcript 202-204; Col. E. Prince, 138. The averments of the bill as to the matters referred to in this section of the statement are clearly disproved by the testimony.

V. After the break in the levee in 1876 the lands in the district were not worth more than they were before the levee was constructed, and not so much with expense and improvements added. See testimony of C. N. Clark, pages 119-121; Wm. H. Gay, p. 154; Esq. Fesler, p. 169 and 171; Ferguson, p. 183; H. Brown, p. 163; J. H. Dickason, p. 146; A. G. Chamberlain, 150.

The owners of land in the levee district had their fences, improvements, and often their houses, washed away year after year, and all their crops were destroyed. Their losses greatly exceeded the value of the land, and were many times greater than those sustained by the bondholders.

See testimony of Hon. M. D. Massie, p. 205; H. B. Atkinson, p. 261; J. H. Brammel, p. 319; Hon. Scott Wike, p. 336; Hon. A. C. Matthews, p. 332; Harrison Brown, p. 164; W. H. Gay, 157-8; Hon. C. N. Clark, 116, 246; C. W. Reed, 295; Col. E. M. Prince, p. 141, and many others.

VI. After the levee broke in 1876, and the law under which it was built was, about the same time, declared unconstitutional, the district went back almost to the condition it was in before the enterprise started; lands were unsalable at any price; tenants left, farms which had been opened were abandoned, and the land owners were forced to take some action to save their investments, or a part of them. They then, or a part of them, repaired the breaks in the levee by voluntary labor or subscriptions, and in 1877 less than one-third of the lands were embraced in the trust deeds above referred to, embracing not exceeding 30,000 acres out of 110,000, for the purpose of repairing the levee. See testimony of W. H Gay, 156-8; Hon. Scott Wike, 338, and many others.

Meanwhile, the bondholders did nothing to assist the stricken people, or to aid in repairing the levee. The land owners were left to struggle with their burden alone.

After making all the repairs of which they were capable, in 1876-8, cultivation was resumed as far as possible. Again the levee broke in 1880, in the month of June, carrying away the wheat in the shocks. Again it broke in the spring of 1881. After the water had receded, corn was planted, which

was destroyed by another break in the fall of 1881. Assessments as heavy as the people could possibly pay were imposed, and the money spent in repairs, but the levee again broke in 1888. See testimony of Hon. C. N. Clark, 116-119, E. J. Chamberlain, 221-223, and others.

In 1880, after the amendment to the constitution of Illinois was adopted (Con. of 1870, as amended, Art. 4, Sec. 31; 1 Starr & Cur. Stat. p. 122,) the present Sny Island Levee Drainage District was organized. This amendment appears on page —— of the brief for appellants.

Prior to December, 1893, when the testimony was concluded, private individuals and the new organization had spent about $450,000.00 in repairs to the old levee, and relocation and building of parts of the new levee, and the United States Government had spent about $50,000.00 in the same work. (Trans. pp. 224-225.)

The total length of the original levee was 52.4 miles. There is now a total of 3.32 miles of the levee in an entirely new location, purchased by the new drainage district, and the United States Government purchased the new right-of-way for the work done by it. The three railroads heretofore named furnished about three miles of the embankment used as a part of the levee system, but it belongs to the said railroads (Trans. pp. 224 and 77.)

Since the above testimony was taken, we may, perhaps, add, a considerable amount of additional work has been done in the way of strengthening and repairing, especially the

lower end of the levee, amounting probably to a cost of not less than $200,000.00. The amount of material which has been used in filling the breaks and strengthening the old levee, is more than that contained in the original levee. (Trans. p. 226.)

VII. We desire further to call the attention of the court to the fact that this transcript shows that the original levee commissioners and the landowners represented by counsel filing this brief, did not resist the enforcement of the act of 1871; but on the contrary, said commissioners employed eminent counsel, including ex-Senator Palmer, to sustain the validity of the act, and even applied for a rehearing in the case when it had been decided adversely by the Supreme Court. It was resisted by comparatively few persons, including Mr. Webster and others, who resided chiefly in the lower end of the district and who have always maintained that their lands were not benefitted by the construction of the levee, owing to the fact that they were overflowed by back water coming around the lower end of the levee, and by water from creeks, etc., and who have always and consistently opposed the scheme and the assessments. So far as our clients are concerned, they were left without the assistance promised by the act of 1871, without any fault of theirs; and a few of those we represent were among the number opposed to the scheme from its inception. We understand counsel for petitioners to concede in his brief that those who thus opposed the undertaking, and those who did not participate in the alleged acts of estoppel, are not estopped to question the validity of the act of 1871. (See brief for petitioner, p—.)

VIII. We would further call the attention of the Court to a large amount of testimony appearing in the transcript, to the effect that persons owning land throughout the district, and parties purchasing lands, learned of the decision of the Supreme Court of Illinois in the Webster case, and relied upon it as a rule of law and property. See testimony of Hon. Scott Wike, p. 358; Hon. A. C. Matthews, p. 334; A. D. Galloway, p. 292; T. W. Rodhouse, 340; A. J. Lovell, 293-4, and very many others.

IX. It is averred in the bill that Francis Palms purchased the bonds involved in this case of the levee commissioners, and paid for them at par. The facts are that the commissioners entered into a contract with the firm of Skelsy, Fuller & Pierce to construct the entire levee; that it was entirely constructed under that contract, by said contractors, and by their bondsmen who took charge of the work after their failure; but always under the terms of the same contract (Trans. p. 80), which appears in the transcript at pages 366-7. The bonds were not issued to the contractors until after the separate sections of the work were completed, and were then paid out on estimates of the engineer, less ten per cent. of the estimates, and were taken by the contractors in payment for the work at 90 cents on their face value, as shown by said contract. See also testimony of G. W. Jones, page 81.

It further appears that Mr. Palms bought the bonds of or through one John Heffron, who was one of the bondsmen of the contractors (Trans. p. 372), and who was in no way

connected with the levee commissioners; and that he bought them at a price not exceeding ninety cents of their face value.

X The Webster case referred to in this brief is not reported, but a certified copy of the order of the court appears in the transcript at page 459, from which it will be seen that the Supreme Court based its decision in that case upon an opinion previously rendered at the same term of Court in the case of *Updike vs. Wright, 81 Ill. 49.*

The Webster case involved an appeal from the order of the County Court of Pike County, as to some of the assessments involved in this case, to the Circuit Court of said county, (in both of which the assessments were sustained), and thence to the Supreme Court, and the case directly involved the constitutionality of the act of April 24, 1871.

XI. We wish further to call attention to the fact that the last order taken under the original bill filed by Francis Palms was on July 7, 1880 (Trans. page 438); that he did not die until November 24, 1886, and attended to his own business up to the day before his death. (Trans. p. 373) The present bill was filed by the executors of said Palms, April 22, 1889, and contains no averment explaining or excusing the delay. The testimony shows that very many of the defendants never heard of the proceedings in the Palms case prior to the summons under the supplemental bill and that those who had heard of it understood or supposed that it had been abandoned many years ago.

It will be observed that in this statement, and in the argument which follows, the petitioners are sometimes referred to as appellants or complainants, and that the respondents are also referred to as appellees or defendants.

We think it proper to state that the brief for petitioners filed in this Court, did not reach us until our own brief was necessarily in type, except that we had a "proof" copy of a part of the "statement" of said brief. We have, therefore, in our brief referred in some instances to the positions taken by counsel for petitioner in the Circuit Court of Appeals and in the petition for a writ of certiorari filed in this court.

ARGUMENT.

II.

THE ACT OF APRIL 24, 1871, WAS UNCONSTITUTIONAL AND ALL PROCEEDINGS UNDER IT ARE VOID.

The legal question which naturally confronts us at the threshold of this case is that involving the constitutionality of the Act of April 24, 1871, and the validity or invalidity of all proceedings thereunder. The bill admits that the act was held to be invalid, in part, by the decision of the Supreme Court of Illinois, and seeks to place the case for petitioners (complainants below) on the ground of estoppel. It seems clear that if the proceedings under which the bonds were issued and delivered to the contractors in payment for work were legally binding, then the remedy is at law and a court of equity has no jurisdiction; and that, therefore, complainants would have no standing in this court.

If, on the other hand, the power was not conferred by the constitution of Illinois upon the Legislature to enact the so-called law, then the Legislature could not give the County Court of Pike County authority to entertain the petition and order the issue of the bonds, and said orders and all acts the several

parties performed under them were and are absolutely void, and a court of chancery can afford no relief.

Hein vs. Levee Commissioners. 19 Wal. 655.
Rees vs. Watertown, 19 Wal. 107.
Merriweather vs. Garret, 102 U. S. 472.
Hodges vs. Dixon, 150 U. S. 192.
Ottawa vs. Carey, 108 U. S. 110 (123).

In the view that we take of the case the law was held unconstitutional by the Supreme Court of Illinois in the case of *Webster vs. The People*, not reported, on principle declared in *Updike vs. Wright, 81 Ill. 49*, the former being a direct appeal from the decision of the Circuit Court of Pike County, involving certain of the assessments now under consideration.

But counsel for petitioners in the court below insisted that the Federal Courts are not bound by those decisions, and may, if so inclined, hold the act of 1871 constitutional; and that said act is constitutional.

We will, therefore, briefly consider that question, although at the time of writing this brief we have not received the brief of counsel for petitioners in this court.

We respectfully submit that this is one of the class of cases affecting real estate and involving the construction of the statutes and constitution of a State, in which the courts of the United States will follow the decisions of the highest court of the State.

In *Elmwood vs. Marcy, 92 U. S. 289*, it is said, on page 294, "We have always followed the highest court of the State in its construction of its own constitution and laws."

To the same effect are:

Fairfield vs. Gallatin Co., 100 U. S. 47.

Post vs. Supervisors, 105 U. S. 667 (669),

and numerous other cases which might be cited.

Assuming that the question is open for decision by this Court, as though it were an original one, we will present as briefly as may be the grounds for holding the act of 1871 and all proceedings thereunder void.

The principles finally established by the case of *Updike vs. Wright, supra*, as we understand them, are as follows:

First—That the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within the provisions of the statute of April 24, 1871, and such proceeding is therefore without authority of enabling law.

Second—That Article 4, Section 31, of the constitution of 1870 (prior to its amendment, adopted in 1878) which is as follows: "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others," does not authorize the construction of a levee independent of drainage.

Third—That section 9, Article 9 of the constitution of 1870, authorizing the General Assembly to vest the corporate authority of cities, towns and villages with the power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, is a limitation of the power of the Legislature, and the General Assembly could only vest such power to make local improvements by special assessments or special taxation upon the municipalities therein named, and had no power to confer such authority upon any other bodies.

Fourth—The burden of taxation by special assessments cannot be imposed upon a locality without the consent of the taxpayers to be affected. The owners of such lands must have the right of election in the matter.

As to the first and second of the above propositions but little need be said further than to call attention to the language of the constitution and statute on the subject. The constitution refers only to drains and ditches; the statute refers to the same, and adds that if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed the petition shall so state and set forth a general description of the same as proposed, etc. (Trans. p. 394.)

The prayer of the original petition addressed to the Pike County Court was for the appointment of commissioners "in accordance with the provisions of the said law, for the purpose of constructing a levee on the Mississippi river," etc. While drains, ditches and levees are referred to in the body of the petition there is no prayer for the construction of anything but

a levee (Trans. 445), and the proceedings of the County Court relate only to the construction of a levee. This brings this case directly within the decision in the Updike case, and shows that the levee was constructed not only without constitutional sanction, but even "without authority of enabling law."

It is said in the brief for appellants (p. —) that, "In the Webster case the levee was in connection with a system of drainage." This statement is clearly an inadvertance, and is not sustained by the evidence. See petition to County Court of Pike County, Trans. p. 445.

We have shown above that the original petition prayed only for the construction and maintenance of a levee. Nothing else is referred to in any of the proceedings. The testimony shows that the various outlets for drainage into the Mississippi river, existing before the construction of the levee, including the mouth or outlet of Sny Carte, were cut off by the building of the levee, and that no substituted drainage was provided. This was one of the most serious grounds of complaint by many land owners, especially in the lower part of the district. See testimony of A. Roy, p. 195; Wm. Lovett, 196-7; F. L. Zerenberg, 77; A. L. Galloway, p. 191; J. W. Brammel, 132; C. N. Clark, 61.

The decision of the Webster case (Trans. 459), stating that it is based on the questions raised and discussed in the Updike case, and that "for the reasons there given the judgment in this case will be reversed," etc., is conclusive of this question.

As to the third of the above propositions, Section 9, Article 9 of the constitution of 1870, reads as follows: "The Gen-

eral Assembly may vest the corporate authorities of cites, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes the municipal corporation may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This clause of the constitution had not been construed by the Supreme Court of the State prior to the act of 1871, but a somewhat similar provision in the constitution of 1848 (Sec. 5, Art. 9) had been construed in several cases. That provision is as follows: "The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." It will be observed that counties, townships, and school districts which were included in the above provision are omitted from the corresponding clause in the constitution of 1870; otherwise the provisions are substantially the same, and the decisions of the Supreme Court under the constitution of 1848 become applicable in the construction of the constitution of 1870.

In *Harward vs. Sinclair Drainage Co., 51 Ill. 130 (135)*, decided in 1869, it was held that the power of taxation could not be granted to private persons or private corporations, and that the Drainage Company involved in that case was a private corporation (page 133), although vested with general corporate powers and declared by the act to be a body corporate with

perpetual succession, etc. It may be observed that the act of April 24, 1871, does not provide that the drainage districts to be organized under it should be bodies corporate, and does not give the commissioners thereof as general powers as those involved in the above case.

In *Hessler vs. Drainage Commissioners, 53 Ill. 105 (112)*, decided in 1870, it is said, "Under our constitution, the right of taxation in no form can be granted by the General Assembly to private persons or to private corporations. In this case "the drainage commissioners," organized under an act of February 15, 1855, expressly creating a corporation with full power of succession, etc., were held to be a private corporation and not a body upon which the Legislature could confer the power of taxation.

In *Lovington vs. Wider, 53 Ill., 302*, decided in 1870, the decision of the Harvard case is approved, and it was held that the police commissioners of East St. Louis were not such corporate authorities, and the provisions of such statute were held void.

In the case of *Wider vs. The City of East St. Louis, 55 Ill., 133*, (decided in 1870), the Supreme Court sustained its decision in the Lovington case. Other decisions upon kindred questions are—

Decker vs. Hughes, 68 Ill., 44.

The People ex rel. vs. The Mayor of Chicago, 51 Ill., 17 (30).

The People ex rel. vs. Solomon, 51 Ill., 37.

East St. Louis vs. Wilts, 59 Ill., 156.

Trustees, etc. vs. The People, 63 Ill., 299.
People vs. McAdam, 82 Ill., 356.

In *Madison County vs. The People, 58 Ill., 456*, decided at the January term, 1871, of the Supreme Court, in considering an act authorizing a district within a county to issue railroad aid bonds, the same to be issued by commissioners appointed for that purpose, a majority of the legal voters having voted in favor of the issue, it was held, (pages 462-3):

First—That the bonds were not valid as a debt of the county, to be paid by taxation upon the property in the strip of territory in question, because it was not uniform in respect to the persons and property of the county.

Secondly—Because the territory in question was not a body corporate; and,

Thirdly—"That Section 5, Article 9, in the constitution of 1848, is a limitation on the taxing power of the state. It only authorizes the legislature to permit a municipal corporation to impose a tax," * * * that "The legislature could not authorize its citizens to create the debt."

The Supreme Court of the United States has repeatedly followed the above construction of the constitution. In *Township of Elmwood vs. Marcy, 92 U. S., 289*, the court commented upon several cases above cited, and among other things said, "The main doctrines of these cases were not new, but had been settled by the repeated adjudications of the Supreme Court of Illinois," (Page 293), and held the railroad bonds in question void.

In the case of *Livingston vs. Darlington, 101 U. S., 407,* the court commented favorably upon the Harvard case, and said, "That Section 5, Article 9 of the constitution of 1848 was not, therefore, intended as a grant of such power, or to remove doubts as to its existence, but to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised; that, consequently, the legislature could not constitutionally confer the power upon any other than the corporate authorities of the county, township, school district, cities, towns and villages, or for any other than corporate purposes;" and, it is said, (bottom of page 410), that prior to July 15, 1869, this seems to have been settled by the Supreme Court of Illinois.

In the decision in *Harter vs. Kernochan, 103 U. S., 562 (570),* it is said: "It is the settled law of the state (Illinois), as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised; and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns and villages, or for other than corporate purposes."

To the same effect is the decision in *Wightman vs. Clark, 103 U. S. 256.*

It will thus be seen that the Supreme Court of this State and of the United States have settled the construction of Section 5, Article 9 of the constitution of 1848, and that these de-

cisions reach back to a date prior to the enactment of the law of 1871. As the provision in the constitution of 1870 is so nearly identical, there can be no question that these decisions properly apply to this case, and that in the Updike case the Supreme Court has merely applied the same line of authority and reasoning to the provisions of the constitution of 1870.

It will, therefore, seem that the Court must come to the conclusion that the entire act of April 24, 1871, and the action of the County Court of Pike County thereunder, including the assessments and bonds in question, were absolutely unconstitutional and void, quite irrespective of any question as to whether the United States Courts will accept the decisions of the State Courts as binding upon them or not.

As the fourth proposition above suggested we would call the attention of the Court to the first section of the act of 1871 (Trans. 394) in which it was provided that "Whenever one or more owners *or occupants* of land shall desire to construct a drain, etc., across the land of others," he may file a petition in the County Court, etc.; that no provision is made for an election for an expression of the wishes of the land owners and no personal notice is required of the proceedings in the County Court.

In the Updike case it is said (page 54): "The clause of the constitution we have been considering, like that of the constitution of 1848, must be understood in the light of the decisions of this Court as forbidding the General Assembly from imposing a burden of taxation upon any locality, without the consent of the citizens affected." And, again, on page 55, "Any

intention to confer such unwarranted power upon one man, who would himself be subject to none of the burdens imposed, ought not to be imputed to the Legislature. Any laws not permitting an election as to the propriety of undertaking the work are vicious and within the inhibition of the constitution." This principle was recognized in *People vs. Solomon, 51 Ill. 37*, and in other cases above referred to.

The Supreme Court of Illinois has always decided that the power to order or impose any tax or assessment, general or special, could only be conferred on some Court or official in the election of whom the people to be affected were entitled to vote. The power under the act of 1871 of ordering the construction of the levee was conferred on the County Court of Pike County, while the levee itself extended northward into Adams County and southward into Calhoun County. The people of the district resident in either of the last two counties had no power to vote for or against any person who was a candidate for County Judge of Pike County. So, that if the act should prevail, it must do so in spite of the fact that a very large portion of the people affected could have no representation in the election or appointment of the Court assuming jurisdiction over their lands. This of itself would be fatal to the supposed statute.

The Circuit Court of Appeals, in passing upon this question, held that as the act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the complainants were issued, it was the province and duty of the court to exercise an independent judgment as to the Act in question under the constitution of Illinois (Trans. 542), and

the court, after such independent investigation, came to the conclusion that the act of 1871 was repugnant to the constitution of Illinois; that the bonds issued under it were void, and that the lands intended to be benefitted could not be specially assessed by any action taken in conformity with the provisions of that Act. (Trans. 551.)

III.

CAN THIS COURT COLLECT ASSESSMENTS AS PRAYED IN THE BILL?

We now pass to another and quite important branch of the case. Let us admit, for all the purposes of the argument, that the defendants did consent to the act of 1871, and did thereby render such law valid in all particulars, except that conceded by the bill, namely, the provision empowering and requiring ministerial officers to collect the assessments. Let us also, for the purpose of the argument, concede that the defendants were bound to bear the burdens imposed by the law, without regard to the receipt or non-receipt of the benefits thereof, there still remains the very important question, what has a court of equity of the United States to do with the matter? Granting that complainants' bonds are, as to the defendants, valid obligations, and that there has been a failure of the machinery of the law for the collection of assessments to discharge such bonds, will a court of equity assume the functions of a tax collector? We submit that the court has no power to do so.

AS TO THE JURISDICTION OF THE COURT.

On what ground is the jurisdiction of the Federal courts sought to be maintained? If the act of 1871 be binding upon the defendants in all its parts, there is no need to invoke the aid of equity. The act itself, and the registration law passed at the next session of the legislature, provide all the necessary machinery, through the agency of the public officers. If the law failed as to any of its provisions for the assessment or collection of taxes (using the term in its general sense), then will equity, for that reason, take jurisdiction? In other words, will the absence of any and all other effective remedies render it incumbent on the court to act, or invest it with power so to do?

We respectfully deny that this court has any authority to collect the Sny assessments. Whether a state court of equity would or could act, is not now the question. We are in a Federal court, and considering its duties and functions only. That a Federal court will sometimes compel the collection of a tax, is certainly true. When any court of the United States renders a judgment, and there exists an officer invested with power to collect taxes wherewith to discharge such judgment, and it is the lawful duty of such officer to make such collections, the United States courts will compel the discharge of such duty by writ of *mandamus*. But in the absence of such officer or officers so empowered by state authority, the United States courts will not perform the duties of tax collectors.

In *Wakely vs. The City of Muscatine, 6 Wall. 481*, an attempt was made by proceedings in chancery, to compel the city of Muscatine to collect a tax wherewith to meet certain

bonds. The validity of the bonds was not questioned, but the court held that the remedy was at law, by writ of *mandamus*.

Indeed, it seems that the purpose of the bill was to obtain a *mandamus* in equity.

In *Supervisors vs. Rogers, 7 Wall. 175*, the proceeding was by *mandamus*, and the main question was whether the United States court, sitting in Illinois, but hearing a cause arising in Iowa, and transferred from that state under the act of congress of February 28, 1839, could exercise the power granted by the statute of Iowa relating to proceedings by *mandamus*. It seems that the statute of Iowa empowered courts issuing writs of *mandamus* to appoint any person or persons to do the act ordered to be done. It was held that in such a case the court was invested with full authority to appoint a proper person to levy and collect taxes, the enforcement of which was within the power of the court, but which would otherwise fail because of the refusal of the proper officer to perform the duty.

So far as we know, this is the only case in which the United States court ever ordered the collection of taxes by any person not authorized and required by the state law to make such collection. That proceeding, however, was by *mandamus*, not by bill in equity.

From the day on which that decision was rendered to the present time, the Supreme Court of the United States has been careful to point out again and again that this ruling was based on the express terms of an Iowa statute, and but for that stat-

ute could never have been made. Such is the distinct declaration of the court in *Rees vs. City of Waterlown, 19 Wall. 107.*

In the case last cited, it appeared that the complainant had obtained judgment at law, and had sought by three different writs of *mandamus* to compel the collection of taxes wherewith to pay said judgments. Being practically without a remedy at law, he proceeded in equity. No doubt all the arguments, based on hardship and necessity, were presented to the court. But it was held that the court was without power in the premises. The court say:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a state in the exercise of this authority, at once so delicate and so important."

To the same effect was *Hume vs. Levee Commissioners, 1st Woods, 246,* approved in *State Tax Case, 92 U. S. 575* Also in *Barkley vs. Levee Commissioners, 93 U. S. 265.*

The leading cases bearing on this certain question are collected and reviewed in *Thompson vs. Allen County, 115 U. S. 550.*

Up to the date of that decision one question seems to have been left undetermined—whether a court of equity would, of

its own authority, appoint a tax collector, and cause taxes to be collected with which to meet municipal indebtedness contracted under a valid law, and while such law remained in full force, and this point was left unsettled in *Merriweather vs. Garrett, 102 U. S. 472.* The court of equity had in every instance refused to make such an appointment, or to empower any officer or person to collect taxes, who was not invested with statutory power so to do; but it was supposed to be still an open question whether such decision applied to the collection of taxes necessary to meet municipal indebtedness, contracted under the authority of law existing at the time of the contract. And it was distinctly held that even in such a case the court had no more power to collect a tax than to levy one, and that a court of equity would not become a tax collecting institution for any purpose.

Thus a long line of decisions is presented directly and repeatedly holding that while the Federal Courts will, in proper cases, compel the collection of taxes or assessments, by officers who are invested with the necessary power, and whose duty it is to exercise such power, yet such courts will not, and absolutely cannot supply authority to persons not so empowered.

It may be said in short, that when the machinery for the collection of taxes is in existence under State authority, the Federal Courts will, in a limited class of instances, compel the agents of the State to set the machinery in motion, but those courts will neither themselves create the machinery, nor invest any person with official power to use the same.

In several of the cases above referred to, the question arose as to the levee bonds, and special assessments to meet the same, and such assessments were regarded as taxes in all respects, for the purpose of such litigation. Complainants' counsel are seeking, by argument and by authority, to establish the proposition that the assessments in question were levied under a law which became valid as to the defendants at least, and that the case simply presents the question whether the court will, in the absence of any other effective remedy, collect such assessment.

To this we reply, that complainants can not ask to be placed in any better position than they would occupy if there were no question whatever as to the constitutionality of the act of 1871. The case is certainly not strengthened by the constitutional defect in the statute under which they claim. Granting, then, that such law is valid in all respects except as to the collection of the assessments, still the court will not and cannot give the relief prayed.

Such is the settled doctrine of the Supreme Court of the United States itself, as declared in *Berkley vs. Levee Commissioners, 93 U. S., p. 264.*

"The remaining prayer, for an order directing the Marshal to assess the tax, is equally inadmissible. It is true, that in the case of *The Supervisors of Lee County vs. Rodgers, 7 Wall. 175*, we held that the Circuit Court acting in that case, after having issued a *mandamus* to the supervisors of the county, commanding them to levy a tax, and they refused to obey the writ, was authorized under the code of Iowa, which provided

for such a proceeding, to issue a writ commanding him to levy and collect the taxes required. But we have never gone beyond this case, which depended on the special law referred to. The Marshal is the executive officer of the court, and can only execute its process; and the court, without some such special authority as that enacted in the Iowa code, cannot enforce its judgment for the recovery of a debt in any other way than by seizing and selling the property of a judgment debtor, or (where imprisonment for debt is authorized) by seizing and detaining his person. Where the debtor is a corporation, it cannot seize the property of its members. This it would do if it should issue a writ to the Marshal commanding him to levy a tax upon the inhabitants of a municipal corporation, or upon their private property. The court has no more authority, in point of law, to seize the property of citizens for the debt of the corporation in which they reside (except in some of the Eastern States, where a different system prevails), than it has to seize the property of another corporation. Its power is to issue a *mandamus* to compel municipal officers to perform their duty of levying a tax, is a distinct power, which extends to all ministerial acts which officers are legally bound and refuse to perform. In the recent case of *Rees vs. The City of Watertown, 19 Wall. 107*, we decided that the court has no general power to commission the Marshal to levy taxes for the purpose of satisfying a judgment, and we refer to that case for a more full explanation of our views on that subject."

"Much reliance is placed by the counsel for the petitioner on the fact that the taxes directed to be imposed by the act of 1858 and 1859, were the first lien and privilege upon the prop-

erty liable thereto. We do not see how this can affect the present application. Liens for taxes are very generally created throughout the country; but it is never supposed that the public creditors, to whom the money raised by tax is to be paid, have the benefit of such lien. It is created for the benefit of the public authorities, to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property taxed."

There is no distinction in this respect between a tax and a special assessment. A tax is defined by the Statutes of Illinois, Ch. 120, Sec. 292 (Par. 294, of Starr & Curtiss), Sub-Div. 14: "Tax—Taxes.—Any tax, special assessments or costs, interest or penalty imposed upon property." *Blake vs. People, 109 Ill., 504* (525).

We think we have shown that even if the complainants were in equity entitled to the relief prayed for the court is powerless to grant it. The Federal courts cannot invest any person with power to collect a tax. Such collections can only be made by public officers duly empowered by State law, and in this instance the State and local officers had no such power, as the Supreme Court of the State decides.

Where a lien is given by statute and a legal mode provided for collecting the money payable thereunder, such mode must be pursued and equity has no jurisdiction.

We have elsewhere contended that when under a contract a certain mode of performance is prescribed and such mode is material to the interests of any of the parties, no other can be

pursued. It is true that a mortgage may be foreclosed in equity, although no judgment has been rendered on the note secured thereby. But this arises from the fact that a legal cause of action, the note, has been embraced in one instrument, and an equitable cause in another instrument; namely, the mortgage. In such a case the parties have agreed to both remedies. Where, however, a lien is given by statute and the same act provides a complete mode of collection, that mode is exclusive of all others.

People vs. Biggins, 96 Ill., p. 481.

If, as counsel for appellants contend, the act of 1871 is constitutional as to any person or persons whomsoever, then its enforcement must be by mandamus, whether against one person or one thousand persons. If appellants are invested with a valid statutory lien, their remedy is at law, and at law alone. On the other hand, if they contend that they are entitled to an equitable lien, it must arise by contract, for all liens must originate in a statute or under a contract.

If appellants place themselves upon a contract lien, then they must abide by and perform the contract. The effect of the contract we have discussed elsewhere in this brief.

Webster vs. People, 87 Ill. 343.

IV.

AS TO FORMER ORDERS OF 1879 AND 1880.

It is apparent from the statements of the bill that counsel for appellant intends to insist that the steps taken in the Circuit Court before the filing of the present bill amount to an adjudication of something.

We deny this, and say that no final decree or judgment was rendered binding on anyone, for the reasons following:

1st. Because the orders entered were too vague, indefinite and uncertain to constitute final adjudication.

2d. Because said proceedings were not binding on any person not a party thereto.

3d. The court in the former proceedings had no jurisdiction over the present defendants.

4th. The former orders, whatever their effect, have lapsed by time, and are no longer in force.

The complainants have been guilty of such delay in filing the so-called supplemental bill, in the nature of a bill of revivor, that they are not now entitled to any relief under the same.

5th. The finding as to amounts due was without prejudice.

No one who inspects the former orders will wonder at the fact that from the 7th day of July, 1880, until the 22d day of April, 1889, a period of about nine years, no step was ever

taken by Francis Palms, or anyone representing his interests, to enforce what is now called a decree in his favor. Had there been a decree definite and final in all its parts, it would have become defunct by the lapse of a period longer than the lives of judgments under the laws of the state. A judgment in this state is a lien only for seven years.

Again, the former proceedings were against the commissioners only—three men, who did not represent the defendants in any way, and who appeared and answered the bill only in their individual capacity. True, after the decision of the Updike case, the owners of about one-third of the lands did convey the same to the three persons who were originally commissioners, as trustees, for the purpose of raising a fund with which to protect the levee from being destroyed. But such trust deed had nothing to do with the assessments in question, nor were said trustees invested with any authority, or required to perform any duty with respect to said assessments or the bonds of the complainants.

We think it perfectly clear that neither Francis Palms, nor his counsel, nor the court ever supposed for one moment that the orders entered were final, or binding on any one other than the commissioners. That complainants' counsel never thought so is evident from the fact that they have brought in the defendants, or as many of them as have been found. Had it been supposed that the former proceedings concluded the defendants and subjected their titles to the assessments in controversy, the present steps would not be taken. It can hardly be said that the presence of the defendants, being deemed nec-

essary, and they being brought into court for the first time, are yet precluded from raising the very questions on which the alleged liability depends. Even if the original orders constituted definite and final decrees, the complainants are of their own motion, opening the same. The very purpose of a bill of review, or a bill in the nature of a bill of review, is to reverse or change the original decree on the ground of newly discovered evidence, or because of manifest and material error apparent on the face thereof. The very object of such a bill is to impeach the decree. (*Story's Eq. Pleadings, 338.*) It seeks for a rehearing. (Note, p. 370; see also p. 403.)

We are not forced to rely on any particular rule applicable to bills of review. The so called *decree* does not purport to be final. It may have been the purpose of the court to bind the lands in the Suy district, pending the litigation, as far as could be done in such a proceeding, for any sum that might ultimately be charged against them. Whatever the purpose was, the orders entered do not resemble final decrees. The court does not find any facts, general or special. There are two orders referred to in the bill of complaint. The first was entered on March 13, 1879. (Trans. 437.) The second was entered July 7, 1880. (Trans. 438.)

By the first order the cause was referred to the Master to ascertain the sums due complainants. It was also ordered that complainants or other persons have liberty to exhibit supplemental bill or bills against present or former owners of said lands, "to compel them to contribute," and to ask for such further relief as complainants be advised they are entitled to.

(Trans. 438.) By the same order the court reserves all other questions of relief to parties. (Trans. 438.)

Now it is perfectly clear that the first order decided nothing, as all material points were reserved.

In the second order, or that of July 7, 1880, the Master, to whom had been referred the question of the amounts due the complainants, having reported, the court overruled certain exceptions of the then defendants to such Master's report. The report was confirmed with the most important qualification, that the amounts found due were "without predjudice." (p. 440).

And again the court permits the complainants, in their own names, or in those of the commissioners, to proceed in this court against the lands and land owners, as they might be advised the same were liable, by bill or bills, supplemental or otherwise, for the recovery of the sums found due as aforesaid, and also for costs.

Now does this mean anything more than permission to proceed against the defendants or their lands, by proper methods, and thereby to test the question of liability? Did the court mean to adjudge the case in the first instance against parties not before it, then bring them in by process, but deny them the right to open the question at issue? Surely not. The truth is, an inspection of the so-called decrees shows that they did not bind any party not before the court for any purpose, and the court never supposed that such persons were bound. The decrees, if they can be so termed, are purely provisional. They do not attempt to distribute the indebtedness

found due, nor to make any provision for collecting assessments, or for subjecting the lands to sale.

All lawyers who are familiar with practice in the Supreme Court of the United States, are aware that the court strenuously insists on the rule that nothing but a final judgment or decree will justify an appeal or writ of error. No defendant can be bound finally by a judgment not final, nor can any order be so regarded which does not fix and measure the liability which it declares. Suppose any of the defendants in the former case had appealed, could anyone know the amount adjudged against him, or against his property? Could anyone say that such decree fixed the liability of such defendant at a sum which would entitle him to appeal? There was no finding and no decree as to the amount due the complainants, much less the distribution of any sum so ascertained over the lands of the district. The first order reserved every substantial matter, for future action by the court. The second and last order declared that the finding, as to the sums due the complainants, was without prejudice.

There can be no final or binding decree in any court of equity, which finds any fact necessary to the liability of the defendant with prejudice. We submit that such a thing is not possible. And we submit, further, that from the terms of the orders themselves, it is apparent that the court intended them to be provisional only, and not binding on any person not before the court. The orders simply contemplate that such parties may be brought before the court, and their rights or liabilities determined, and that, in the meantime, any lien created by the

act of 1871 on the assessments, or on the lands, shall be continued so far as the commissioners, the then defendants, were concerned. That was all the court meant. The court gave the complainants leave to litigate the questions with the real parties in interest, and afforded every facility to that end. Complainants were allowed to proceed in their own names, or in the name of the commissioners.

Why should the Court so carefully give this privilege, and provide the means for bringing in the present defendants, if their rights were already adjudged and determined? And why should the complainants invite further litigation to decide that which is already settled? The original bill did not attempt to make defendants of a small number of land owners, as representatives of the whole, in order to test the question of their liability, or the liability of their lands.

In the case of *Fourinquet et al. vs. Perkins, 16 How. 82,* it appeared that the Circuit Court had entered an interlocutory order in favor of complainants, and had directed an account to be taken in accordance with said decree. Upon the report of the Master at a subsequent term, exceptions having been taken to the report, the court reversed its action and dismissed the bill. This action was fully sustained by the United States Supreme Court, and it was held that the previous orders, though on the merits, were open for revision and under the control of the court; and that if the court changed its opinion, it was its duty to correct the error.

WERE DEFENDANTS BOUND BY REPRESENTATION?

That the Levee Commissioners were not trustees for the land owners, to the extent of binding the latter in litigation, may, we think, be assumed. Their duties were merely such as the act of 1871 defined, if that act were valid, and their powers were created and limited in the same way. These functions were statutory, and did not include the representation of all or any of the residents of the district in all such litigation as might arise relating thereto.

There are many instances in which individuals may be represented in litigation by their trustees alone. Wherever parties claim through and under a trust, the trustees may appear for them within the scope of their appointment. Most municipal bonds are made payable to trustees, and show that fact on their face. We may say that all railroad bonds are so drawn, and show on their face, as well as on that of the trust deeds securing them, that they involve a trust. As a general rule they can only be obtained through trustees. It follows, therefore, that parties purchasing such instruments necessarily take them, subject to the trusts, shown by their terms. It may well be that in litigation arising on such evidences of indebtedness, the parties claiming the same shall be bound by the representation of their own trustees within the scope of their trusts.

The commissioners had issued no obligation purporting to bind the defendants personally, nor did they in any such instrument purport to bind the property of the defendants as their representatives.

But if they had done so, their authority would remain the vital question. How far the alleged participation by the defendants in the various proceedings set forth in the bill should bind them or some of them under the trust, and whether such allegations are true or false, were matters open to dispute, which required to be established by proof. And no such issues could be tried or waived without the presence of the parties in interest. The alleged facts which are set up as having the effect of bringing the defendants within the operation of the trust, are matters purely *in pais*, and even if proven, the result thereof was matter of discussion in which the defendants had a right to be heard. Nothing the trustees could do or admit would bind the defendants as to the facts which are alleged to have subjected them to the representation of the trustees. Whether such facts existed at all, and if so, whether they did in law, subject the defendants to the representation of the trustees, were jurisdictional matters which must have been established before any single defendant could be bound by anything done by or any decree rendered against the trustees.

Trustees may, within the scope of their authority, and no further, represent those who select and claim under them, but as to the fact of such claim or selection, they have no representative authority whatever.

The jurisdictional fact must be established before the right of representation arises, and when the alleged facts consist of sundry and various proceedings *in pais*, open to dispute as to their truth, and to discussion as to the results, the parties interested have a right to be heard before anything whatever is adjudged against them.

We have, for mere convenience, spoken of the defendants in the original cause, as *trustees*. Under the act of 1871, they were not trustees for any natural person whatever. They were merely commissioners, empowered to build the proposed levee, and issue bonds on behalf of the Sny district, in the aggregate, as a *quasi* corporation. Years afterwards they were made trustees under a trust deed, executed by less than one-third of the original defendants for the purpose of raising money with which to prevent the levee from being washed away. Even that trust deed was not made on behalf of the holders of the Sny bonds, nor did they have any interest therein.

It is now contended that the commissioners were, by some process of reasoning, or of construction, and as the result of acts of the present defendants, invested with a trust on behalf of, and therefore entitled to represent the latter. No deed or other instrument declared such trust, or gave such power.

As we understand the rule, no person can be bound by the representation of of any trustee or other agent, where the effect or validity of the act on which the right of representation depends is itself a matter of dispute.

Generally speaking, an assignee may sue in equity to enforce the interest or claim assigned, without making the assignors parties. Yet Mr. Story says: "But when the assignment is not absolute, or unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, then he is not only a proper but a necessary party."

Story's Equity Pleadings, par. 153.

It may be remarked that not only were the commissioners totally unauthorized to represent the individual land owners, but they were in fact, either absolutely adverse thereto or capable of becoming so. Under the terms of the act of 1871, it was their duty to enforce the collection of assessments in the interests of parties entitled thereto. In the event of their taking such action they would represent the bondholders as *quasi* creditors, and could not at the same time represent the land owners, who were *quasi* debtors.

Returning to the character of the original bill in this case, we are aware that on the hearing below, counsel for appellant insisted that the bill was not one of review, but one of revivor. We fail to comprehend how this fact could aid them, in view of the positions which they are now assuming. The filing of the bill of revivor admits that they are dead. A living order needs no resurrection. The act of filing a bill of revivor is in itself an explicit admission that the thing to be revived is *functus officio*. All this will appear more relevant hereafter, when considered with reference to the defense of *laches*.

We do not think it important to discuss this question further, first, because the former orders were merely interlocutory; and second, because they show on the face thereof that the court intended that all persons not then before it, and whom complainants desire to bind and conclude, should be brought in and fully heard.

V.

EFFECT OF OVERRULING DEMURRER TO BILL.

Counsel for appellants insist that as the court overruled a demurrer to the present bill as originally filed, all the allegations contained therein are now judicially established. Without inquiring whether such a rule ever existed in chancery, it is certain that it does not exist in modern practice. The admissions of a demurrer are only for the purposes of the demurrer, unless the party filing the same elect to stand thereby, and in that event the judgment becomes final. It would indeed be strange if counsel for appellants should be permitted to make up an issue on a full answer to the entire case made by the bill, take testimony on all issues for two years, and then discover that really the entire case as made by the bill had been determined by the court in overruling the demurrer, and that there was nothing practically left to try. As a matter of fact the court in passing on the demurrer merely held that the case could be better determined on answers. This has been openly declared by Judge Allen, who sat on the argument of the demurrer and on the final hearing.

But all this is quite apparent from the whole record. The court, after overruling the demurrer, gave the defendants leave to answer. They did answer fully as to the whole case and appellants filed replications and a vast amount of evidence was taken. If counsel for appllee intended to insist that every allegation of the bill as originally filed was fully determined by the court in overruling the demurrer, they should have excepted to

all parts of the answer which met the averments of the bill. Then the court would have been required to say whether such was its own understanding as to the state of the record and to make any alteration required in its former orders so that the merits of the case might be heard. If there was ever anything in appellant's present objection they waived it by failing to except to the answers and proceeding to take testimony on the issues as made up.

Marple vs. Scott, 41 Ill. 50.

But there is one complete answer to the point now made by appellant's counsel. After the demurrer was overruled appellants repeatedly amended their bill. This opens up the entire pleadings. It is a settled rule that filing an amendment or a bill of review opens the whole case and all former decretal orders which are in themselves interlocutory. This has been fully determined both by the State and by the Federal Courts.

Gibson et al. vs. Reeves, 50 Ill. 406, and cases cited.
Marshall vs. Vicksburg, 15, Wallace U. S. 149.

The corrected certificate of the clerk of the Circuit Court shows that the amendments to the bill were made long after the demurrer was overruled, to-wit, Nov. 5, 1895, and long after most of the evidence in the case was taken. We do not, however, except or object to the evidence on the ground that it was taken before the amendments were made, nor question its application to the case on that ground; but we refer to this fact only to show that the bill was amended in important particulars after the demurrer was overruled.

VI.

LIS PENDENS.

It is contended on behalf of petitioners that all the defendants had notice of complainants' supposed rights either by the filing of the original petition for the construction of the levee or by the filing of the original bill herein on May 4, 1878. Those petitions and the said bill are now alleged to have given constructive notice to every one—subsequent purchasers, mortgagees, heirs and all persons whomsoever, whether such persons ever heard of any of the proceedings or not. And this result is claimed to have arisen whether the statute of 1871 was constitutional or otherwise. We may remark that under the original proceedings by petition in the County Court of Pike County, no process was actually required or served, and under the original bill there were no defendants except the three commissioners, made parties in their official capacity. The first proceeding was not a suit at all, and the statute being unconstitutional, it had no effect as a proceeding on behalf of the state or under its authority. Even if the original bill of 1878 had embraced the parties in interest and been duly followed by the service of process, it could not charge any one under the principle of *lis pendens*.

If the alleged notice grew out of the pending suit under the principle of *lis pendens*, then we squarely deny the application of such principle, as no man can be permitted to begin litigation, let it slumber along for many years, and then claim that while he, the complainant, was thus calmly sleeping, the

property in litigation was practically tied up, and all parties dealing with it did so at their peril. Notice by *lis pendens*, can only be kept alive by the diligent prosecution of the cause.

In *Herrington vs. McCollum, 73 Ill., p. 483*, the Supreme Court of Illinois say:

"The rule is said to be, that, to affect purchasers, there must be a close and continuous prosecution of the suit; the exercise of reasonable diligence, unaccompanied with any gross slips or irregularities, by which injuries could accrue to the rights of third parties." And many cases are cited in support of the proposition.

In *Durand vs. Lord, 115 Ill., p. 621*, the same court lays down the true and reasonable rule applicable to notice by *lis pendens*. Complainants in equity, who desire that a pending bill shall have the effect of giving notice to third parties, must not be guilty of such delay as to justify the conclusion that they have abandoned their cause.

It is not sufficient to convey notice by *lis pendens* to file a bill in court against persons who do not own the title to the property to be affected. The general principles applicable to this subject have been recently laid down by a decision of the Supreme Court of this state, as follows:

1. The property involved must be of a kind subject to the rule.

2. The court must have jurisdiction both of *persons and of the res*.

3. The *res* or property involved must be sufficiently described in the pleadings.

Norris vs. Ile, 152 Ill., 202.

Bennett on Lis Pendens, p. 153.

It is essential to a *lis pendens* that the claimant of the *res* should be impleaded, and the *lis pendens* begins where a bill is filed from the service of summons, and not before. *Allison vs. Drake, 145 Ill., 500, (516).* If he is not before the court the *res* is not bound. The rule *lis pendens* only binds claimants to the property who are impleaded, and their *pendente lite* purchasers. If they are not impleaded, they are at liberty to dispose of the *res*, and the purchaser will take it unaffected by the suit, although it may be pending against parties other than the real owners.

13th Am. & Eng. Enc. of Law, p. 882b, and authorities cited in Note 2; also p. 902 and Note 4.

Games vs. Stiles, 14th P., 322.

In *Miller vs. Sherry, 2 Wall. 237 (250),* it is said:

"The principle applies only to those who acquire an interest from a defendant *pendente lite.*"

Grant vs. Bennett, 96 Ill., 513 (521).

Hallom vs Trum, 125 Ill., 247.

Franklin Savings Bank vs. Taylor, 131 Ill., 376.

In *Story's Eq. Jur., Sec. 406,* it is said:

"But he who purchases during the pendency of a suit, is bound by the decree which may be made *against the person from whom he derives title.*"

We insist, then, that even the original suit has lapsed as to the parties thereto, and that it was not notice to purchasers. As to the present defendants, the present suit is a new one, and in so far as it constitutes *lis pendens* the notice begins with the filing of the supplemental bill. The principal grounds of equity averred in this bill were not contained in the original suit. It makes substantially a new case, as well as brings in new parties. Where a bill originally so defective as not to create a *lis pendens* is subsequently cured by amendment, *lis pendens* will commence from the time of filing the amendment, where the defendant has been served with process.

Norris vs. Ile, 152 Ill., 202.

So it is with an amendment that sets up a new equity.

13 Am. & Eng. Enc. of Law, p. 886, and cases in note.

The case of *Miller vs. Sherry, 2 Wall. 250, 251,* fully sustains the above authorities upon both of the questions presented.

Clarkson et al. vs. Morgan, 6 B. Mon., 441.

In this case the complainants took no step whatever for nine years. As against third parties, the force of even a final decree would have been lost in that time. Yet they insist that during all these years every man dealing with land in the Sny District had notice under the *lis pendens.* We are not now

contending with reference to the application of the Statutes of Limitations as to the original land owners, but we do contend that complainants can found no equity on the original proceedings, either in the way of charging third parties with notice, or under the doctrine of *res adjudicata.*

So far from the defendants being bound by notice, we maintain that if the complainants ever had any equity they have long since lost it. The defense of *laches* and limitations will be considered in a subsequent part of this brief.

VII.

THEORIES OF COMPLAINANTS' BILL.

The bill filed by complainants originally, and adopted in the amended bill, is founded on two theories. One of them, as we understand it, asserts the proposition that under the decision of the Supreme Court of Illinois, in *Updike vs. Wright, 81 Ill., p. 49,* only that portion of the act of 1871 which relates to the *collection* of assessments was held void, leaving all other parts of the law still valid. The other theory asserts that as to the defendants, the act of 1871 is in full force in all its parts.

If the first theory be sound, all the provisions of the statute in question, which relates to the formation of the district, the proceedings in the County Court and before juries, the assessment of damages and benefits, and the imposition of taxes on lands, are perfectly valid, and nothing has failed but the power to collect taxes lawfully imposed. Therefore the com-

plainants ask this court to confer on the state or local officers or upon some other person or persons the power to make the required collection.

We have seen that if this theory be true, the Federal court has no authority to enforce the collection of taxes or assessments, even for the discharge of a debt adjudged to be due, unless through public agents who derive their authority from the state itself. We have also seen that the Supreme Court has held in *Updike vs. Wright* that the act of 1871 is unconstitutional and that the state officers have no power to make such collection. The regular collecting officers have no authority derived from the state to do the act in question. So says the state Supreme Court. In the absence of such authority, the Federal court can not confer it. So says the Supreme Court of the United States in the cases already referred to. These two propositions cover the whole question as to whether this court can or can not do what complainants ask.

As already stated, the second theory of complainants asserts that *as to the defendants*, or, as to some of them, the act of 1871 is still in force in all its parts, on the ground that they have, by their acts, estopped themselves to dispute the validity of the law, although it has been held void as to others.

Both theories assume that the statute of 1871 may, in whole or in part, be void as to one person and valid as to another.

Now, we know that there are cases in the books in which language is used that might seem to sustain such contention.

And yet it is obviously false. A law cannot operate on one citizen and not upon another at the same time and within the same jurisdiction. Its force does not depend on outside evidence, or on the consent or non-consent of any one. It represents the supreme authority of the state, and from thence it derives its force.

Wherever the courts have used words which would seem to indicate that a statute might be regarded as being in force not because the supreme authority of the state had enacted it, but because some one had chosen to adopt it, they only mean that persons may estop themselves from denying that certain obligations defined in such supposed law have been so far voluntarily assumed that they have become binding on such persons. In other words, that a party may, by his conduct, raise an implied promise to perform certain acts specified in a void law, and in the interests of justice the courts will compel the performance of such promise, the statute furnishing the terms of the contract. This is all that is meant.

This subject is fully treated in the argument of Gen. Harrison, which follows, and the authorities which might be cited will not be considered here.

VIII.

THE DOCTRINE OF ESTOPPEL AS APPLICABLE TO THIS CASE.

(By Benjamin Harrison.)

We have already shown, we think, conclusively, that the act of 1871 was wholly invalid as a basis for these proceedings,

first, for unconstitutionality and, second, because it did not relate at all to the construction of levees.

There neither was nor could have been any law authorizing these bonds and assessments. The Supreme Court of Illinois, before the original bill in this case was filed, and in a case involving these identical assessments, had so decided. We have further cited a line of cases in Illinois, ante-dating the alleged contract in this case and establishing the same principles. These decisions related to the construction of the statutes of Illinois, and established a rule that is binding upon the court.

But appellants ask the court to give them separate judgments *in rem* against numerous tracts of land for the amounts of separate tax assessments for the construction of the levee, notwithstanding that the legislature of Illinois had never passed any law authorizing such assessments for the construction of levees, and that the Constitution of Illinois forbade the passage of any such law.

It is claimed that, though the proceedings out of which these assessments and the bonds of appellants came may have been wholly void, *ab initio*, as to the general public, and for reasons that everybody was bound to take notice of, yet by reason of certain things said or done, or not said or done, by the appellees, they cannot say that the law is invalid or unconstitutional and this court, as to them, can and should enforce the assessments precisely as if the law had authorized them and had been a constitutional enactment.

The present bill seeks to collect not only the assessments actually made by the drainage district, but asks to have such further assessments made upon the lands as may be necessary to pay the bonds in full, and to maintain and preserve the security. (Transcript of Record, p. 45.)

And if, by reason of estoppel, the act of 1871 is good law as to the appellees, why may not all of the provisions be put into operation against them? The prayer of the bill goes that far. It asks that by a receiver the further assessments necessary for repairs shall be made. (Transcript, p. 45.) Perhaps this relief is asked upon the theory that the law was as to every one a valid enactment. But if this doctrine of legislation by estoppel is allowed, must not the courts carry the law to its full end, if anything is yet executory? Can the courts cut a void law into halves—and make one-half good?

On our part we insist that an unconstitutional law is absolutely void as to every one, and that it cannot be affirmatively enforced *as a law* by any court against any one. To say otherwise is to say that the courts may make laws, and that free from the limitations which the people have placed upon the legislative power.

The power to declare a law void for unconstitutionality is a very high and delicate judicial power; the power to follow this finding by a decree putting the whole law into operation as to certain persons is, it seems to us, an amazing and dangerous stretch of the judicial power; and the power to make valid half a void law upon a consent that went to the whole law is unsupportable.

It must of course be admitted that not every one can require the court to pass upon the constitutionality of a law, or for that matter upon any other question. The person who invokes a decision must show a personal interest, and bring in a person who controverts it. There must be a real issue joined—a scholastic issue will not serve.

Ordinarily the courts not only allow but enjoin a suitor to tell the truth. This rule is, however, subject to the limitation that he has not before fraudulently or with gross negligence induced or allowed another to believe that the truth was otherwise than he now asserts it to be, to the prejudice of such other person.

This rule, however, is limited to matters of fact, as to which ignorance and reliance upon the representations of another is allowed. But no one is permitted to be ignorant of the law or to rely upon the representation of the man he is dealing with as to the law of the case. In fact only courts of last resort can certainly know what the law is, and the certainty of the courts may in part be dependent upon the fact that what they say is law, thenceforward is—however it may have been before!

In the case at bar there is no pretence that there was any fraudulent representation or suppression on the part of appellees or any of them as to any matter of fact; nor that they or any of them by their conduct induced Palms or any other person to believe that any fact was otherwise than it really was. A "misleading" is an essential element of every estoppel, and that element is wholly absent in the case at bar.

The estoppel sought to be enforced against the appellees relates wholly to a matter of law—and as to that there can be no pretence that Mr. Palms relied upon anything said or done by them. The appellees were not lawyers, but chiefly farmers, and the evidence affirmatively shows that Mr. Palms, before buying the bonds, had the opinion of three eminent Illinois lawyers as to the legality of the proceedings out of which the bonds came. Mr. Palms, so far as appears, never saw or communicated with any of the defendants. He bought his bonds in open market, not from them or any of them, nor from the levee commissioners.

But leaving these facts out of consideration for the moment, the case may be stated thus: Two persons, each in the honest belief that a certain legislative act is unconstitutional and applicable, contract with each other with reference to that law and upon the consideration of the securities, profits and protection which the law gives to them respectively, which in this case were, on the part of the contractor, the profits of construction, and on the part of the bond holders, the annual interest upon the bonds and lien upon the assessments stipulated for; on the part of the land owners, the legal right to assess all those benefited rateably for the construction and maintenance of a levee for the protection of their lands.

The consideration upon which these land owners consented to submit their lands to assessment has failed—wholly failed, as it seems to us—for a green and untried levee is not a defense but a snare, if there be no compulsory provision for its defense and repair.

No levee was ever constructed on the Mississippi river that did not require vigilant and organized watching and compulsory drafts for its defense. No sane man would ever contribute to a levee scheme that did not include adequate compulsory provisions for defense and maintenance.

But if the failure of consideration was only partial—any implied engagement of the land owners was indivisible and the consideration cannot be apportioned. The evidence clearly shows that the losses suffered by the land owners, by reason of the breaking of the levee, greatly exceed the amount of the bonds of appellant.

But the failure of the compulsory process for repair was not all. When the law fell, not only the only practicable method of maintaining it (that by compulsory assessments) failed, but the right of any number of land owners, less than all, to maintain it by voluntary contributions also failed.

Some of the land owners resisted the proceedings from the beginning, and as to them the levee never was a lawful structure. Where it was built across the land of any such protesting land owner no one, after the law failed, could lawfully enter upon the land to repair it. The land owner had a right to cut the levee or to level it to the original surface. As to some whose land lay back from the levee, it is in evidence that the levee by cutting off the natural drainage and pocketing the water, inflicted and increased flooding of their lands. As to these the levee was a nuisance that a court would have restrained —perhaps one that the land owner himself might have abated. Indeed upon what other principle, after the law failed,

could any land owner, no matter what his relation to the proceedings, have derived the right to exclude from his land persons who sought to enter and repair the levee? Is all this to turn upon the proving of facts constituting estoppels *in pais?* Who could set up estoppel? Who could determine whether repairs were needed, or the character of them? The confusion and inadequacy of relief into which any attempt to enforce such a law as this, as to certain persons, would lead, are indescribable.

The allegations of the appellants' bill show that Palms bought his bonds upon the faith that the levee was a lawful structure, and of a compulsory provision for its repair. He alleges that the lands were valueless to him as security, unless the levee was maintained and kept in repair; and that is, of course, to say, that they were valueless to their owners. He, as well as the land owners, looked to those provisions of the law that made the levee a lawful structure and provided for its repair, as essential things. (See Trans. p. 537.)

The proceedings here are for the enforcement by decre and writ of the law of 1871. The court is asked to confirm the jury assessments of benefits, to declare that they created valid liens upon the lands, and that the bonds sued upon are valid bonds, and are a lien upon the assessments. The appellees are not here asking for an injunction or other discretionary writ, or for any affirmative relief whatever. They have been brought in by your writ of summons, and are here to object that this court shall declare a void law to be enforceable against them, and especially that it shall declare a part of a void law—the part

that puts a burden upon them—to be valid, while they lose the compensatory benefits of the other parts of the law.

We insist that it is contrary to equity when two persons have acted in the mistaken belief that a certain law was valid, and the law fails for unconstitutionality, before one of them has received the consideration contemplated by the law, that the other should be allowed to have by court decree the full consideration moving to him, from these several defendants.

THE GENERAL LAW OF ESTOPPEL.

In examining the authorities on the true definition of "estoppel in pais" and the terms and conditions on which relief is granted by virtue of that great principle, one cannot avoid being surprised by the multitude of decided cases and the variety and conflict of the decisions. It is difficult to draw from them all a clear and true rule that will not contravene the opinion of some court. Indeed we think it would be impossible to do so, as extreme confusion undoubtedly exists. For instance, many cases hold in expressed words that no man can be estopped by his words or acts unless an intention to defraud is shown to have existed.

Other cases declare that it is sufficient if negligence exists, whatever the intention may have been. Many decisions turn on the question whether relations of trust and confidence had or had not existed between the parties. All, however, assume that in order to create an estoppel, whether by words, or acts or silence, the party demanding relief must show that he had a right to rely and actually did rely on the assurances given by the other party.

The Supreme Court of Illinois has, somewhat recently, however, stated for us the law of estoppel of that state as applicable to a case where there was a mutual mistake of law.

In *Holcomb et al. vs. Boynton, 151 Ill., pp. 299 and 300,* it is said:

"The case lacks several of the essential elements of an estoppel. In the first place the proof is not clear and convincing that Boynton procured the judgment and redemption, and ordered the sale. And if it be conceded that he did, it does not appear that he acted with a fraudulent purpose, or that Pierce and Dean have lost anything thereby. The entire proceedings in the county and circuit courts were preserved in public records open to inspection. Applying the law, they knew the sale by Charles Kellum was void, and that every step taken after the rendering of the decree was of no effect. How were they deceived? Certainly by no concealment of facts or fraud on the part of Boynton. He may, if regarded as the author of the first redemption, have labored under a mistaken notion of the law and considered the sale as legal. It is a novel idea in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all. As we understand the doctrine of estoppel *in pais*, it is based upon a fraudulent purpose and a result. Before it can be invoked to the aid of a litigant, it must appear that the person against whom it is invoked has, by words or conduct, caused him to believe in the existence of a certain state of

things and induced him to act upon that belief. If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby, and is entitled to an application of the rule, but will be considered as having acted upon his own judgment solely. The essential elements are: Misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance upon his part in acting upon the representations.

Story Equity Jurisprudence, 1534.
Davidson vs. Young, 38 Ill., 152.
First National Bank of Quincy vs. Ricker, 71 id., 439.
Dinert vs. Eilert, 13 Brad. 99.
Herman on Estoppel, 969."

And the rule of the Federal Courts has been stated with equal emphasis in *South Ottawa vs. Perkins, 94 U. S., 267.* As we shall notice this case again, we only quote a sentence or two here.

The court say:

"There can be no estoppel in the way of ascertaining the existence of a law * * * The doctrine of estoppel is totally inadmissible in the case."

It is the very essence of an estoppel, that the party setting it up has relied, and had the right to rely, upon an assurance given by speech, or silence when speech was called for, or by some act, or failure to act, when action was called for. And as

every person is equally chargeable with knowledge of the law, no man is entitled to rely upon the opinion or representation of another as to what the law is.

Estoppel is a misnomer for the doctrine of some of the cases that when a law is found to be unconstitutional, a party who has received the full benefit of the law may be compelled to pay for it according to the terms of the law.

Such cases can only rest upon an implied contract, the terms of which are to be sought in the invalid law, and it must follow that such an implied contract can only be enforced when the full consideration of it has been received by the party against whom it is to be enforced.

In the cases which we shall now proceed briefly to review, many things have, we think, been inconsiderately said in the way of dicta, but the cases may be placed in two general classes:

First. Writs of injunction have been refused to suitors, seeking to stay the collection of special tax assessments, upon the ground that, as they received *the full benefits contemplated by the law* without protest, and had in some cases affirmatively promoted the work, they ought in equity to meet their implied obligation to pay for the work, and so could not have the writ of injunction.

Second. In others of the cases the courts have used the doctrine of estoppel as the ground upon which tax assessments defectively levied or levied under a void law have been enforced.

This class of cases must go upon the theory of an implied contract, the terms of which are to be sought in the void law.

The case which has moved the courts to strain their powers, as we think, to find a remedy, is this: The land owner has sought and received all the benefits contemplated by the law, and then sets up the invalidity of the law to relieve himself from the assessment.

But when the law breaks down before its essential scheme has been executed; before the contractor has completed his particular work, or so as to take away the legal power to do other things essential to the use of the work done, considerations of equity do not allow, much less require, that one of the parties shall have all the profit and advantages the law contemplated in his behalf and that all the loss shall fall upon the other; that the latter should be held bound to pay for a result that he never did and clearly never would have contracted for.

The court cannot apportion the consideration, for it is single and the contract non-separable; and this is not an action by the contractors to enforce an equitable lien on a structure built by them, but a suit upon bonds that were issued without any authority of law, and to enforce assessments that have no necessary relation to the value of the structure built. The question of a contractor's lien upon the structure is quite another thing, and we have no such case here. That case would proceed upon the invalidity of the law and the failure of its provisions as to assessments, and against those who had appropriated the work—not for a contract price, but for its value at the time of its appropriation.

For ourselves, we utterly reject the doctrine that what the formal action of the supreme legislative body of a state cannot make to be law, can be made to be law by the act of an individual. But we feel sure that no respectable authority can be found where a special tax assessment has been enforced upon the ground of a so-called estoppel, unless the person sought to be estopped had received the full benefit the law would have given him if valid.

THE CASES IN THIS COURT AS TO ESTOPPEL.

In the case of *South Ottawa vs. Perkins, 94 U. S., p. 267*, this court said:

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case, and for one party, and not a law in another case and for another party; a law today and not a law tomorrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

In this case bonds had been issued under a void law, bought innocently, and the town had paid one installment of interest. The circuit court held the town "estopped" and this court in reversing the judgment used the language we have quoted.

If in the case at bar the action had been against the Sny Levee District as a municipal corporation, upon the bonds, it could not be disputed that the South Ottawa case would compel a decision that there was no estoppel—unless this court should reverse itself. In the case at bar the payment of one or more tax assessments is relied upon as estopping those who paid them to say that the law was unconstitutional; but if the voluntary levying of taxes by South Ottawa to pay interest upon its bonds, and the collection and paying over of the money to the bond holders worked no estoppel to the town, can the payment of the taxes by a citizen of the town under threat of process estop him?

Or did his liability to pay any tax the town had assessed, to pay the bonds, depend upon the question whether he had called or attended a town meeting to promote the scheme, or gone down to Springfield to urge the passage of the law, or upon the fact that after the law failed he had united with other citizens to promote by voluntary contributions the thing the law failed to give?

Would the court have considered such suggestions, or given its process to collect illegal assessments to pay invalid bonds to holders who were as much chargeable with knowledge of their invalidity as the tax payers?

In the case at bar the bonds were signed, issued and sold by the commissioners of the drainage district, and the interest paid was paid by them. The land owners had no control of the question whether bonds should be issued, and no contractual privity with those who bought the bonds. The bonds were

void and there was no estoppel against the commissioners to say so. Upon what principle then can a land owner be estopped, when it is sought to subject his property to a tax for the payment of the void bonds? If the drainage district had been held to be a valid municipal corporation, the courts would not have given a mandate for the collection of the tax to pay the void bonds—the thing it is here asked to do directly by its own process.

The case at bar is a stronger one for the denial of an estoppel than the South Ottawa case. In that case the invalidity of the law grew out of the fact that the Journals of the Senate and House did not show certain things which the constitution required to be shown. A minority of this court, in a dissenting opinion, held that an estoppel should have been allowed, *because*, the question, whether the Journal did, or did not, show the necessary steps to have been taken, was a *question of fact*. But the rule, as stated by the minority, would deny an estoppel in the case at bar. They say:

"When the question is one of construction alone, all parties stand upon an equal footing, and each can judge for himself. If a mistake occurs it is one of law and not of fact."

In *Norton vs. Shelby County, 118 U. S., 425, (442,)* it is said:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as if it had never been passed."

In the case of *Marsh vs. Fulton County, 10 Wal. 676,* it appeared that bonds had been voted by the county in aid of the Wabash railroad and were afterwards issued to a division of the road. It further appeared that interest had been paid upon the bonds (page 680) and other acts of ratification were set up. In the opinion of the court it is said: "It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It was a case, too, where the holder was bound to look to the action of the officers of the county to ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder." (Page 683.) And referring to the subject of ratification, it is said: "It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified, etc." (Page 684.)

In *Loan Association vs. Topeka, 20 Wal., 655,* the Supreme Court, after declaring the bonds in question void, it being beyond the power of the Legislature to authorize their issue, said: "We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the Legislature was without power to authorize the issue of these bonds, and its attempt to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot of itself create the power to levy taxes, resting on no other foundation than the fact that they once had been illegally levied for that purpose." (667).

"Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued is bound to take notice of the statute and of all its requirements." (*McClure vs. Township of Oxford, 94 U. S. 432.*) We insist that the bonds in question were not municipal bonds, for there was no municipality, but as they refer to the law under which they were issued, the purchaser thereof is charged with the knowledge of all the facts that he might have ascertained by investigation as to their validity and all facts of their issue; and, furthermore, that every citizen of the United States is supposed to know the law.

In *Post vs. Supervisors, 105 U. S. 667 (669)*, it is said:

"Fifth—That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued."

In *Parkersburg vs. Brown, 106 U. S. 487*, it is said:

"There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some installments of interest on the bonds, or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust."

The appellants have cited several cases decided by this court, and we will now proceed to examine them; we ask that

the precise question may be kept in mind, viz.: Can a mutual and honest mistake of law be made the ground of an estoppel, and a void law enforced as if it were valid?

In *Moran vs. The Commissioners, 2 Black, 722.* the estoppel was distinctly as to a matter of fact, and it was merely held, that when a county was authorized by statute to borrow money and issue bonds for the payment thereof, and the county authorities issued such bonds, reciting on their face facts which showed them to have been regularly issued, that the county was estopped by such recitals to deny their validity in the hands of a *bona fide* holder for value.

Daniels vs. Tearney. 102 U. S., 415, is the case most relied upon by appellants, but the case itself, when carefully examined will, we think, be found rather to support our contention, so far as it has any application to the case at bar. The Secession Convention of the State of Virginia, as one of the measures preparatory to secession, passed an act (April 30, 1861,) providing that any person whose property had been taken in execution might, by giving a bond for the payment of the judgment, have his goods released—not for a definite time, but so long as the law should stay in force. One Porter, recovered a judgment against one Daniels in the Circuit Court of Jefferson county. The judgment defendant availed himself of the law by filing the required bond June 1, 1861.

To a suit brought upon the bond by Tearney et al., Executors of Porter, after the civil war, it was answered that the law under which it was given was unconstitutional and so the bond was void. A majority of the court was of the opinion

that the bond was good as a common law bond. The objection of the minority to this view must, we infer, have rested upon the fact that the obligee had not accepted the bond—that as to him the whole proceeding was, as the full court held, *in invitum*. He had not in any way, expressly or impliedly, made himself a party to the illegal proceeding, or agreed to take any profit or advantage from it. The judgment defendant invoked the law, put it into operation, *nolens volens*, against the judgment plaintiff and had received the full benefit of the law. The consideration of his bond had been fully received.

A case more unlike the case at bar it would be hard to state. Here nothing was done *in invitum*. The contractors made a voluntary contract for an anticipated profit; the bondholders purchased the bonds voluntarily from the contractors for a profit of ten per cent. discount and an annual interest of ten per cent. The land owners submitted to assessments upon the consideration of a valid law for the equal assessment of all the lands benefited for the construction and permanent defense and maintenance of a levee system. If any lands benefited might escape an assessment for either purpose, the consideration upon which any land owner had accepted the law wholly failed.

That the opinion in *Daniels vs. Tearney* is hinged upon the consideration that it was not a case where the parties had voluntarily, and for a consideration moving to each, acted upon the mistaken belief that a law was unconstitutional, is clear from this paragraph:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be noted here, that where a party has availed himself for his benefit, of an unconstitutional law he cannot in a subsequent litigation *with others not in that position* aver its unconstitutionality as a defense," etc.

These italicized words are to be read in the light of the facts of the case. The obligee of the bond sued upon had not availed himself of the law for a benefit. The bond was put upon him. In the case at bar both the contractors and the bondholders did avail themselves of the law for a benefit.

It ought also to be noted here that in the Kentucky cases cited, the citizens who had at the request of other taxpayers borrowed upon their individual notes from the banks the necessary bounty money, or had advanced the money themselves, did not do this for an individual benefit; they were not of the class of contractors. They were agents doing without reward the bidding of principals who afterwards sought to escape liability. In the opinion in *5th Bush* it is spoken of as an "agency," thus:

"By what rule of equity or law should they be permitted to withdraw their assent to this assumed liability and agency, though it be evidenced by a statute instead of a mere personal contract."

It is to be further observed that in *Daniels vs. Tearney*, the proceeding was upon a bond brought by the obligee therein. The bond was enforced. In the case at bar the object of the suit is not to enforce a contract between the complainants and

the land owners, for there was none such—but to put into operation by a decree of this court the processes of a void law.

The value of *Daniels vs. Tearney* to the appellants, if any, must be found, not in the case proper or in the principles applied to the facts of that case, but in the supposition that this court, by citing certain cases, has committed itself to principles of law that were neither called for nor used in the judgment it rendered. Perhaps this is the best place to examine these cited cases.

The Kentucky cases, *Ferguson vs. Landram, 1 Bush. 548, Same vs. Same, 5 Bush, 230,* were cited by this court as we think, without a careful examination of the applications made by the Kentucky Court of Appeals of the supposed rule of an estoppel to assert the unconstitutionality of a law.

The rule as applied in the Bush case is this: That when what the court thinks to be a benefit falls upon any one out of an unconstitutional enactment he is estopped to deny its constitutionality, notwithstanding the fact that he had absolutely no part in procuring the law, and had neither said nor done anything with relation to any proceedings under it—the imputed benefit having fallen upon him as the rain falls upon the fields of the prayerless and unthankful man—unsought and unpreventable.

We resisted the petition for a certiorari, but are ready to agree that it was quite natural that this court should avail itself of the first opportunity to disclaim the imputation of having sanctioned such a rule.

In the Kentucky cases, the Court of Appeals held that a law permitting taxes to be levied to pay bounties to volunteers in order to supply the quota of a county and so to avoid a draft for the Union army, during the civil war, was unconstitutional for the reason, in substance, that to fill the army was a national and not a state purpose. The decision was probably wrong, and the hardship resulting to persons who had borrowed the money to pay the bounties was such that the court apparently strained its judicial powers to relieve them.

It was held that as to those who had promoted the law, or attended the town meeting, it was a good law, and that the county could go on and levy the tax upon their property. The extent to which the court goes is seen in some of the concluding paragraphs of the opinion. There, as here, there were classes who did diverse things, and were held liable for differing reasons to pay the judgment. The conclusion is announced by the court, that, as to everybody who received any benefit from the law, or to whom the court could impute a benefit, it was a good law. The court did not require any affirmative act on the part of the persons held bound, but held it enough if a benefit came to them *in invitum*. They had not asked for the law; they had done no affirmative act, but a benefit was imputed, and it was held to be a law, as to them. We undertake to say that no court, after full consideration, will feel like adopting these conclusions. Let us see what some of them were. We quote:

"Appellants A. P. Chambers (and certain others named) were all of military age and therefore liable, unless they show

some special reason for exoneration. Chambers attempts two. First that he was in prison when the first meeting was held, and therefore he did not participate. But this imprisonment ended before the money was borrowed, before the volunteers were obtained, and before the enactment was procured or the tax levied. Secondly. He asserts that he had been exonerated from the previous draft and was not required to pay the commutation thereunder; but he was only exonerated from that draft, not because of permanent disability; and, even so, he should have caused his name to be taken from the subsequent enrollment as each name increased the quota of the county. *Besides, he had two slaves subject to draft.*"

Here is a man in jail when the town meeting was held; who was exempted from a previous draft; who took no part in the business, but he was at large while some of these things were being done; and being at large, and his disability not being a permanent one, he had to pay the tax, because he did not cause his name to be taken from the enrollment—which if it had been done would not have relieved him, for he had two slaves who were subject to draft.

The court then names certain other persons of whom it says they were of military age, and continues:

"William Britt had a slave subject to the draft of 1864; hence his responsibility, which is not relieved by his certificate of exemption, dated February 11, 1865, after the liability had been incurred and the draft avoided."

He did nothing. He was not liable to be drafted, as it was proved, but he did not come in and get his name off the list.

The court then proceeds: "Jacob P. Howard (and others) had slaves subject to conscription, and Grigg approved the law and advocated the levy of the tax in the County Court; hence their liability. Bright (one of those named) perhaps was not then a citizen, but temporarily residing in the county." And yet he seems to have been held.

The court continues: "John D. Robinson advocated the levy of the tax before the County Court, and thereby ratified it, and both he and Grigg (who did not advocate the levy) had either sons or *sons-in-law* who were liable to conscription."

The court says as to all the above named persons the injunction was properly dissolved.

As to a certain other class of persons named, the court says: "As they were *not liable to conscription no valid reason* for enforcing the tax on them is perceived, as the evidence does not show either a benefit, procurement of the law or a ratification of it by them, which should appear affirmatively before an invalid tax could be enforced against them."

We do not find that the liability to the tax of a spinster having no living male relatives and no slaves, upon the ground of a possible benefit to result from the possibility that she might have some special interest in some bachelor who was liable to the draft was affirmed, but the rule announced would cover such a case.

It must be remembered also that the Kentucky cases were for injunction to restrain a tax and that all the court says is to be taken only as deciding that the complainants did not make a case for that discretionary writ.

The court did not, however, put the unconstitutional law into full operation. The law in the case of Boone county authorized the county to issue bonds to refund the sums advanced by citizens to pay bounties and to levy a tax to pay the bonds. It was held that the bonds could not be issued, but that the tax would not be enjoined as to certain classes of persons. The court did not give any process for its collection—only refused to enjoin the collection

But even the extreme and, as we think, untenable doctrine of these Kentucky cases will not save the case at bar—for no one was held bound who had not received the full benefit contemplated by the law. The scheme of the law had been fully worked out—everybody was relieved from the draft.

Let us suppose that it had been broken down at an earlier stage; that the draft quota was fifty men and only ten volunteers had responded to the offer of a bounty before the law fell. How would that situation have been dealt with? Would the court have held a man who was taken in the draft for forty men still liable for the whole tax on the ground that he had received a benefit because the ten volunteers had reduced the chances of his being drafted twenty per cent? Or would only twenty per cent. of the tax have been exacted?

All of these impossible and incongruous situations grow out of the attempts of the courts to apply this illogical doctrine that a law is a law and it is not.

It should be further noticed that the action in *Daniels vs. Tearney* was upon a bond—*inter partes*. The court was not asked, as in the case at bar, to reconstruct and put into operation the machinery of an unconstitutional law—to collect taxes illegally levied and pay over the proceeds for the discharge of bonds illegally issued. So in the cases cited by this court in *Daniels vs. Tearney* the actions were based upon a tort or upon an express or implied contract.

In *National Bank vs. Graham, 100 U. S., 699*, the action was for the value of a special deposit, and the defence was *ulta vires*.

In *Railway Co. vs. McCarty, 96 U. S., 258*, the action was to recover damages for injury to stock, and the defence was the Sunday law. The court held that the company, having put its defence on the ground of a lack of care, could not shift it to the Sunday law.

In *White vs. Franklin Bank, 22 Pick., (Mass.) 181*, the case was assumpsit for the amount of a time deposit which the bank was forbidden to receive. The action disaffirmed the illegal contract.

In *People vs. Murray, 5 Hill, (N. Y.)*, the suit was upon a bond—an express contract, and the consideration had been fully received.

The appellants cite *Dickerson vs. Colgrove, 100 U. S., 578.* In this case an estoppel based upon a disclaimer of any interest in a tract of land was set up. Some things said in this case are fatal to appellants' case. First, that estoppel involves fraud. Second, that it is always so applied as to promote the ends of justice; and third, that it can only be used for defense and not for assault. Here no fraud is alleged; to throw all the loss of a mutual mistake upon one of the parties does not promote justice; and the estoppel is here used as the ground of assault. (P. 580-1.)

In *Burlington vs. Gilbert, 31 Iowa, 356,* it appears that the city had ample authority to improve its streets by special assessments levied upon abutting property, when a petition was presented to the city council signed by two-thirds of the property owners to be affected; that the defendant and others signed and presented such petition, asking the improvement to be made, "that was made," and when the city solicitor reported that the petition was not signed by the requisite number of names, the petitioners took it, obtained additional names, and again presented it to the council. The work was done, *as requested in the petition.* Under these circumstances, it was held that those who signed the petition were estopped from raising the question whether the petition was signed by two-thirds of the property owners, and from questioning their liability for the work when completed.

The Circuit Court of Appeals, in the opinion below, said (Transcript of record on petition for certiorari, page 545):

"The entire argument of learned counsel for the plaintiffs on this part of the case leaves out of view, or assumes to be of no consequence whatever, the fact, apparent on the face of the Act of 1871, that what the land owners, proceeding under it, had in view, was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things, it cannot be supposed that any land owner would have become connected with the scheme embodied in the Act of 1871, unless the *maintenance* of the levee, by competent legal authority, was assured. It is, therefore, unjust to the land owners to say nothing more than that they consented to the construction of the levee. If they are to be deemed to have assented to anything, it must be further said that they assented to a scheme under which a levee was to be constructed *and maintained*, under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. The system devised by the Act of 1871, is to be looked at in its entirety. We cannot put out of view a vital part of it, and hold the land owners who acted in good faith, and who gave no personal assurances or made any representations, responsible for the results to others flowing from invalid legislation and the partial execution of the original plans. If it be said that the plaintiffs' testator would never have purchased the bonds, except in the belief that the Act of 1871 was valid, with equal truth it may be said that the land owners never would have sought, or desired, such legislation, except in the belief that the levee would be maintained by the same authority that constructed it."

But it is true, not only as to the land owners, but as to the bond holders as well, that the provision of the law for compulsory repairs was an essential part of the scheme. Mr. Palms would not have bought a bond but in reliance upon that provision any more than the land owners would have assented to an assessment without it. The bond holders' security, as well as that of the farmers, is found there. It was a mutual interest—an essential part of an indivisible consideration. In the bill and in the petition it is alleged that without a levee—meaning of course a structure that would keep the flood out, not one year, but permanently—the lands were worth no more than fifty cents per acre; that the defendants were "bound to preserve, protect, improve and repair the levee" by ratable assessments and a receiver is asked to make compulsory assessments to save the bondholders' security.

The Circuit Court of Appeals, in its decision, found nothing to sustain the view that the appellees or any of them were estopped to allege the invalidity of the law of 1871.

Referring generally to the cases that court said:

"Some authorities are cited which apparently support this view. But when carefully examined they do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by the present record."

Many of the cases were, as we have said, bills for injunctions; and many others relate to the waiver of constitutional provisions conferring personal privileges or exemptions. They do not at all involve the question of pursuing in an executory way the provisions of a void law.

In all of the cases cited, we think, when a special assessment was enforced, a valid municipal body existed with power to assess for local benefits, and in many of them the objection related to irregularity of method. We do not think there is any case where an assessment was levied by a body having no legal existence, or no power to assess for any purpose by any method. And all were cases where the party making the objection had received the completed benefits of the law, and the real ground of the judgments was an implied contract.

We will now proceed to examine some of the other cases cited from the state courts.

Blake vs. The People, 109, Ill., p. 521, 522. In this case there was no question of enforcing an estoppel against either party to the record. It was not asserted, either by counsel or the court, that any party before the court was not at full liberty to suggest the invalidity of any law.

In November, 1878, an amendment to the constitution of Illinois was adopted, providing as follows:

"The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby." (Const. of 1870, Art. 4, Sec. 31.)

Under this provision an act known as the "Drainage and Levee" Act was passed by the legislature of Illinois, providing that whenever a majority of the owners of lands within a district proposed to be organized, representing at least one-third in area of the lands, desired to construct a drain, levee, etc., or "to maintain and keep in repair any drain or drains, ditch or ditches, levee or levees, heretofore constructed under the law of this state," etc., they might present a petition to the County Court of the county in which the greater part of the lands were situated, asking for the appointment of commissioners, etc.; that on the hearing of the petition commissioners might be appointed, surveys made, etc., and the lands in the district assessed a proportionate share of the cost of the improvement, or allowed damages, by a jury appointed for that purpose.

2 Starr & C., Ill. Stat., 2d Ed., Chap, 42, Sec. 2, etc., p. 1501, et seq.

A levee district was organized under this act to preserve and repair a levee that had been built, or partly built, under the invalid law of 1871. A property owner raised the objection, among others, that the old levee had not been built under a law of the state, within the meaning of the act, because the Act of 1871 was no law. The court was only called upon to decide whether proceedings under the Act of 1871, for the construction of a levee, were within the purview and purpose of the Act of 1879. Indeed, it was not called upon to decide even so much as that, for it was held that the question was one to be raised on the confirmation of the assessment roll, and came too late on appeal. Now, in the state of the record, it was impossible that

the court should decide that the law of 1871 had become a law as to particular persons, or any person, by reason of acts done that worked an estoppel. No such person was before the court, and there was neither issue nor evidence on the subject. The most that could be said was that there might be some such person, and, therefore, the court could not say that the Act of 1871 was not a law of the State of Illinois, in the sense of the Act of 1879. It was known to the legislature, for the Supreme Court had so decided, that the Act of 1871 was unconstitutional and had no application to levees; and there was never any other act or law under which any proceedings for the construction of levees had, or could possibly have been taken. Strictly speaking, there neither was, nor could be, any levee in Illinois constructed under a law of the state. Is it, for a moment, to be supposed that the legislature intended the Act of 1879 to apply only to cases where it might be found that one man was estopped to deny that the Act of 1871 was valid law? Plainly, what the legislature meant, was to authorize the completion and repair of levees that had been constructed under an act, purporting to be a law, and specifically the Act of 1871. All that is distinctly recognized by the court. We quote:

"We are therefore of the opinion that so far as the levee was constructed and remained at the date of the filing of this petition it may fairly be regarded as falling within the meaning of the term 'under any law of this state.' This is moreover strengthened by the history of the constitutional amendment, of which we may take judicial notice. There was no law in force authorizing the construction of the levees over lands of others, (save the Act of April 24, 1871) at the time *Updike vs. Wright*

and Webster vs. Levee Commissioners, supra, were decided. To obviate the effect of those decisions—allow the construction of levees, as well as drains, upon the lands of others—and to authorize the formation of *quasi* municipal corporations for the purpose of constructing drains and levees, the amendment to Section 31, Article 4 (of the constitution), was submitted to, and adopted by, the people, at the November election, in 1878. The Act of May 29, 1879, but repeats, in this respect, the language of that amendment. The levees, therefore, which must have been referred to, because none other could reasonably have been intended, were the levees which had been constructed, but could not be kept in repair because of the decisions in *Updike vs. Wright and Webster vs. Levee Commissioners.*"

If the validity of proceedings under the Act of 1879 depended upon finding that some one or more persons were estopped to deny the validity of the Act of 1871, some direct proceedings against such person or persons would be necessary. It would not be enough to say that there might be some such person. The case cannot be accepted as an authority upon the questions here.

It should further be observed that the question as to whether the Sny levee was constructed "under any law of the State of Illinois," was not strictly before the court, as appears by the following language:—"It would, perhaps, be sufficient answer to this to say that we cannot take judicial notice that the purpose for which the corporation was created was not, in the language of the second section, 'to keep in repair drains, ditches and levees heretofore constructed under any law of this state,' and

whether, in fact, it was or was not, was a question to be raised and determined by proof on confirmation of the assessment roll, and it consequently *now comes too late.* But *assuming* the question to be properly before us, it must be decided against the appellant," etc. (P. 521.) It therefore appears that whatever is said upon this subject in the Blake case is strictly an *obiter dictum.*

THE AUTHORITIES CITED IN THE BLAKE CASE.

It is worthy of remark that the cases cited by the court in the Blake case, and by Judge Cooley, in his work on constitutional limitations, involve merely the waiver of property rights or personal privileges concerning no one but the party entitled thereto. In none of the cases were there any questions as to the future operation of the law. The controversies related to waivers already complete. In not one instance was it shown that the executory force, and perfect validity of the statute in dispute, was the main inducement to its acceptance by the parties, nor was it pretended that in any instance the purpose of the statute had failed or been defeated.

Many of the cases cited did not even involve the validity of a statute, but the power of a party to waive a privilege such as that of homestead, or the right of trial by jury. That such privilege may be waived in various ways is beyond question.

But suppose a statute was passed in this state providing that every defendant in a criminal cause, who would waive his right of trial by jury, should be entitled to select from a large list of judges the particular judge by whom his case might be

tried. And suppose a defendant, acting under such a statute, did waive his right to a jury trial, and afterwards a decision should be rendered by the Supreme Court of the State, holding the statute which purported to confer such a privilege on the defendant, void, or that the list of judges from which the defendant might make his selection must be largely reduced, would the law compel such defendant to abide by his waiver? It would be monstrous to so contend. Nor could any court reasonably hold that the defendant must be content to accept a part only of the privilege or advantage which induced him to waive his right. If by consent he made the law valid, he did so on condition that he should enjoy all the benefits by the prospect of which his action was induced.

In *Baker vs. Braman, 6 Hill, 47*, the leading case cited by Judge Cooley, it appears that a statute was passed, authorizing one man to take the property of another for his own use, at its appraised value. The party whose land was taken expressly consented. The whole matter affected no one but the parties, and there was no question as to the future operation of the law. The condition or consideration which had induced the consent of the party complaining, had not failed. It was contended on his behalf that his consent was void under the statute of frauds. The court held, that, while the act was unconstitutional, it was to be read as though the consent of the land owner was made a condition in the law itself, and that it was quite competent for the legislature to create an exception to the statute of frauds. The plaintiff simply consented that the defendant should enter upon and take his land on the terms specified in

the statute; and then, when the defendant had entered, he was sued as a trespasser.

To the same effect is *Embury vs. Conner, 3d N. Y., 511.*

The case of *The People vs. Murray, 5 Hill, 468,* has still less bearing on the present controversy. A statute of New York authorized a certain person to erect a dam across the Genesee river. The act required such person to give a bond to pay damages to any person injured by the dam, the damages to be assessed by a justice of the peace. The bond was given and the dam was built, and the person giving the bond resisted payment on the ground that the act under which the dam was built was unconstitutional because a jury trial was denied. The court held that the parties took the grant with the conditions attached, and could not be permitted to question the obligation. Not only had the defendant received the full benefit of the law to which he had assented, but he had entered into an express contract to pay the damages. The bond was absolutely valid and binding, without regard to the act in dispute.

Lee vs. Tillottson, 24 Wendell, 339, simply holds that a party who expressly consents to the appointment of referees in an action on account, waives his privilege of trial by jury.

Mayor of New York, 8th Barbour, 489, is another case of the class to which we have referred. An alms-house in New York required more land, and in 1821 the legislature of that state passed an act authorizing the taking of such land on payment of the value, to be assessed under a prior law. The land was appraised and paid for in full, the land owner accepting

the money ($13,000) without objections. Afterwards the city sold the land, and more than twenty years after the original transaction the representatives of the original owner sought to recover the price received by the city for the property in 1845. The court held that while the Act of 1821 was unconstitutional the owner, by accepting the compensation without objection, waived all questions as to the validity of the law. Here again is a case in which there was a complete acceptance and execution of the statute involved; and no failure of any part of the inducement. It was not a question of enforcing a void law but of holding a man to his contract.

In *Delwole vs. Brake, 46 N. Y., 318*, substantially the same question was presented, with the additional fact that after the land owner had consented to the appropriation of his land, and thereby waived all objection to the law, other parties were seeking to set up his personal privilege, and to urge objections on his behalf, which he did not set for himself. Of course, this could not be done.

We do not need, I am sure, to review the numerous cases cited by appellants, where the estoppel rested upon the ground that the person has, by his silence, where he should have spoken, or by speech or conduct, induced another to believe and act upon the belief that certain facts existed, or did not exist.

The reason upon which these cases are rested is, that one party was informed, and the other was ignorant of a fact. The express or implied representation was one upon which the other could rely. So far from suggesting that there may be an es-

toppel as to a matter purely one of law, as to which there was a mutual mistake, these cases proceed upon a line of argument that absolutely excludes an estoppel as to matters of law.

SOME OF APPELLANTS' CASES NOT BEFORE NOTICED.

In *Burlington vs. Gilbert, 31 Iowa*, one who had signed a petition for the improvement of a street was held to be estopped to deny the fact that the petition was signed by two-thirds of the abutting owners.

Van Hook vs. Whitlock, 26 Wend., 43, was a case where the acceptance of a dividend by a creditor under an assignment made in pursuance of a law that provided that the individual liability of the stockholders of the assignor corporation should be waived, was an effectual waiver, notwithstanding the fact that the law was unconstitutional. It was in the power of the creditor, for a consideration, to release the stockholders, and the court held that he had done so; his receipt for the dividend, under the invalid proceedings, was a good release.

In all of the local improvement cases that we have examined, the whole work contemplated by the law or ordinance had been done. The assenting property owners had received the entire consideration and benefit contemplated by the law. The cases also proceed upon the theory of an implied contract. We notice a few cases that may be taken as types.

Jackson vs. Detroit, 10 Mich., 248, and *Kellogg vs. Ely, 15 Ohio St., 64*, represent the cases where the remedy by injunction was refused. In the first case, Campbell, J., said:

"We do not think that a court of equity can properly interfere to relieve a party on the ground that assessments are irregular and unauthorized by the strict provisions of law, when they are substantially authorized by, and made in reliance upon his own express agreement." In both of these cases the work had been completed.

In another class of cases it is held, as we have before said, that constitutional provisions conferring particular personal benefits may be waived.

Of these the petition of *Edward Cooper, Mayor of New York, 93 N. Y., 507*, and *Lee vs. Tillottson, 24 Wend.*, are types.

In the first case Cooper took part in proceedings for the condemnation of real estate and signed a petition for the appointment of appraisers. He afterwards objected that the use was not a public one and it was held that he was estopped by his assent to the proceedings to set up his constitutional right that his property should not be taken without his consent for a private use.

Lee vs. Tillottson was a case where a party having consented in writing to a reference, afterwards set up his constitutional right to a trial by jury.

The case at bar is wholly different from any of the cases cited by appellant in this: That the court is here asked to take up and put into operation a scheme of special assessments made by a body that had no legal existence, and if it had, was forbidden by the Constitution of Illinois from making any as-

sessments for any purpose, to pay bonds issued without authority of law, and to introduce, by the use of the doctrine of estoppel, into the State of Illinois a taxing agency not allowed by the political system of that state, as against people who were guilty of no other wrong than an honest belief that a law was constitutional and who have not received the full benefit of the invalid law, but practically no real benefit.

CLASSES OF PERSONS SOUGHT TO BE ESTOPPED.

We do not think it worth while to enter into a discussion of the law of estoppel as applicable to the particular persons or classes of persons sought to be charged by the bill. But, as exhibiting the utter unreason of the complainant's contention, it may be well to notice some of the doings or non-doings that are made the grounds of the estoppels claimed.

1. One or more of the defendants are said to have procured the passage of the Act of 1871.

2. A few others are alleged to have actively participated, as petitioners and otherwise, in the organization of the levee district, or in the management before the bonds were issued.

3. Others of the defendants who took no part whatever in any of the proceedings—but were absolutely quiescent until after the bonds were issued—are charged because, after the bonds were issued and the law was held to be unconstitutional, they united with others in a futile effort to maintain and repair the levee by voluntary contributions—an act, it is said, of appropriation and ratification.

4. Others of the defendants, who neither said nor did anything, are sought to be held because, knowing that the proceedings were pending, and afterwards that the levee was in course of construction they neither said nor did anything.

5. Others are sought to be charged because they paid interest on their assessments for the years 1873 and 1874.

6. Another class is sought to be charged because they participated in the organization of the new and legal levee district after the Constitution of Illinois had been amended and a law enacted authorizing the formation of levee districts.

7. Another class consists of those who purchased lands since the decision of the Webster case, and whose deeds contained certain references to the assessments made under the Act of 1871.

It must be kept in mind that the relief sought in this case is the collection of the assessments made under the law of 1871, and that estoppel is sought to be enforced against the right of the defendants to assert the invalidity of those assessments.

A word or two now about these classes in their order.

1. We deny that the courts can impute to any one the "promotion of the passage of a public law." The suggestion is in derogation of the legislature. Upon this question the Circuit Court of Appeals said:

"But we are of opinion that it is not appropriate to say that the enactment was procured by any individual or individuals. It must be conclusively assumed that the legislature,

although hearing what individuals said on the subject, acted upon its own judgment as to what was proper to be done. It may be that under certain circumstances individuals may incur responsibility by reason of acts or representations on their part under an enactment adjudged to be invalid. But representations made by them to the legislature in reference to a proposed enactment, or any expression of their desire for the passage of such enactment, cannot be regarded as material in determining questions of responsibility or liability for acts done under or in execution of legislation supposed at the time to be valid but subsequently adjudged to be invalid." (Trans. of Rec., p. 546)

If this doctrine is allowed, the estoppel must more certainly extend to every legislator who votes for a bill, and to the presiding officers and chief executive who approve it.

2. As to the second class, the general discussion we have given is a full answer. These parties were not in privity with persons buying the bonds in the open market; they entered in good faith into the scheme of a law they believed to be valid, and were willing, if they could have the benefits the law purported to give them, to be subject to its burdens. They never gave anyone reason to believe that they would pay assessments for building a levee that they had no power to protect.

3. As to the third class, the acts upon which the alleged estoppel is based were done long after Palms and the others had purchased their bonds. These voluntary conveyances of lands as security for money to be raised to repair the levee

upon their faces repudiated any liability for the debts of the defunct levee district. And, as to an appropriation of the levee by reason of these repairs, we answer, first, there was no appropriation of it by these individuals, and could not have been; second, that if the bondholders had any lien upon the levee these acts did not affect it, save as the repairs would better the security; and, third, that these bondholders had no lien, legal or equitable, upon the levee and are not here asserting such a lien.

4. As to the fourth class, all that has been said as to the second class is applicable, and this further, that these only submitted, because they supposed they must, to what purported to be a law. No one was authorized to infer that they sought the levee or would pay an assessment that was not legal. And even if the court might, in any given case, say they were bound because benefits had been conferred by the law that they did not seek, it cannot in this case be said that they were benefited by a levee that presently broke and let in the river to flood their lands as before, and swept away improvements they had made upon the faith of a levee that could not be maintained.

5. As to the fifth class, surely no prejudice was done to those who had already bought bonds by the paying of money into a fund for their benefit, and quite as surely the payment of one installment of a tax is not a waiver to contest future installments. The cases we have cited from this court explicitly hold that such payments do not work an estoppel.

6. As to the sixth class—those who, after the constitution was amended and a valid levee law passed, organized a new

levee district for the construction of a levee—how did these acts, done long after appellants had bought their bonds, work any injury to them? So far from implying a confirmation or affirmance of the old assessments, the new proceedings went upon a total disaffirmance of them. If it is said that the remnants of the old levee were appropriated, that is a totally different matter, and one with which these bondholders had nothing to do, unless they had some lien upon the levee, which they did not; and even if they had, in this case they do not proceed for the enforcement of any such lien. The appropriation of the levee, or so much of it as remained, is in no way related to the question whether the old assessments can be collected.

(End of that part of the brief written by Gen. Harrison.)

The foregoing argument on the subject of "estoppel" is the only part of this brief actually written by Gen. Harrison, and it reached us after his death. He had, however, participated in the argument of this cause in the Circuit Court of Appeals, had considered substantially all of the subjects discussed in the brief, and approved the views we have taken of them. In this aspect his mind pervades the entire brief.

But we know from his letters, as well as from the brief itself, that he had not said all that he wished to say upon the subject of estoppel. He had not received a copy of the brief for petitioners in this court, and it was his intention to review some matters which would doubtless be discussed in that brief, and to consider certain other authorities cited on behalf of petitioners. We will, therefore, refer to those subjects and

cases, discussed in the Circuit Court of Appeals, as we understand them, although we have not yet received the brief of opposing counsel to be filed in this court.

7. PERSONS WHO PURCHASED LANDS SUBJECT TO LEVEE ASSESSMENTS, ETC.

It is insisted that parties who bought their lands under deeds containing recitals that they were subject to liens for levee assessments are thereby estopped to question the validity of the assessments.

These recitals are invariably found in warranty deeds, and amount to an exception from the warranty, as, for instance, "except levee assessments," or, "subject to all taxes, levee assessments," etc.

It may be conceded that if these recitals are in language sufficiently distinct to put a reasonable person on inquiry, they would amount to notice of the proceedings to which they refer; but such recitals do not amount to a personal contract, nor to an estoppel against the parties in whose chain of title they occur from making any defense which they have set up in this case. This question has been decided by this court in the case of *Bryan vs Forsyth, 19 Howard 334 (338)*, in which it appears that one Bogardus, in 1838, obtained from the United States government a patent to certain lands in Peoria, Illinois, which recited that the premises were granted "subject, however, to all rights of any and all persons claiming under the Act of Congress of 3d March, 1823," etc. One Forsyth claimed the same property under said Act of 1823, and it was decided that he

obtained a perfect title; and it was also held that "the patent to Bogardus was a fee simple title on its face, and is such title as will afford protection to those claiming under it, either directly, or having a title connected with it, with possession of seven years as required by the Statutes of Illinois." It was further held that the reservation in the deed Bogardus did not prevent him from relying upon the defense of limitations.

Another case involving a deed containing the same clause is that of *Mahan vs. Forsyth, 24 How. 175 (178)*, in which it is held that said saving clause was only for the purpose of exonerating the United States from any claim of the patentee in the event of his ouster by persons claiming under the act referred to; that the position of the patentee was adverse to that of those claiming under the act of 1823; that he was not their tenant nor did any fiduciary relations subsist between them; that the patent imposed no duty upon him to recognize their claims, and that there was no estoppel created by such recitals against pleading and relying upon statute of limitations.

The Supreme Court of this State reached the same conclusion in the case of *Lender vs. Kidder, 23 Ill. 49 (52)*, and in *Bryan vs. Melton, 125 Ill. 647.*

The latest decision of the Supreme Court of Illinois, affecting this question, is that of *Crawford vs. Nimmons, 180 Ill., 143.* In that case the defendant who had purchased land under a warranty deed containing the clause: "Subject to a certain mortgage indebtedness of two thousand dollars, and interest thereon, dated January 2, 1894," set up in his answer the defense of usury in the making of said note and mortgage

by his grantor, and in commenting upon that question the court say: "It has sometimes been said, in substance, that if the mortgagor sells the land, subject in express terms to a previous mortgage, the purchaser cannot question its validity; but when the cases are examined it will be found that additional facts have been required to prevent the grantee from making the defense. In all cases where it has been held that the grantee cannot question the validity of the mortgage he has purchased the property on the basis of a clear title at an agreed price, and has assumed to pay the mortgage debt *as a part of the consideration*, or the amount of such debt has been deducted from the purchase price of the land on the basis of such clear and complete title." The conclusion of the court was that the defendant was not barred by such recitals from setting up the defense of usury. While the cases cited above related to the defenses of limitations or laches and usury, they apply in principle to any other defense.

The petition for certiorari, under this head, refers to persons who "assumed and agreed to pay the assessment." We have not been referred to any evidence in the record that any of the defendants entered into such agreement. If any such language was used in any deed, it is merely only an awkward form of expression, for there is certainly no evidence that any purchaser of lands in the district "assumed and agreed to pay" the levee assessments as a part of the consideration for his purchase, and he would not be estopped, under the authority of the above cases. But if such an instance is to be found, yet no relief can be given in the present form of action. This is not a case of

a valid foreclosure (which would give the court jurisdiction) and a request for a deficiency decree as an incident to the original right of action, as in the case of *Keller vs Ashford, 133 U. S., 610*, cited by counsel. Moreover, that was a case originating in the District of Columbia, where, we understand, the distinctions between common law and equity practice are not maintained as in this State. Here, the remedy in such a case, if any, would be by *assumpsit*, and a court of equity would not have jurisdiction.

Schmidt vs. Glade, 126 Ill., 485 (490);
Dean vs. Walker, 107 Ill., 540 (542).

The courts of Maryland have passed upon this question of estoppel in two cases. In *Mayor, etc. vs. Porter, 18 Md. 284*, it appears that Porter filed a bill to enjoin the sale of his property to pay an assessment for street improvements. He had signed a petition asking for the improvement. The assessment was held illegal because the petition was not signed by a majority of the owners. It was held that signing the petitition did not estop appellee from questioning the validity of the assessment, and it was said: "But because the appellee has signed such an application, it surely cannot be successfully maintained that he assented that the work should be done *in any other way than the law requires*, or if he had so assented, that such assent could confer no power on the city commissioner not possessed by him under the law and ordinances of the city." The above case is sustained in *Mayor, etc. vs. Grana Lodge, etc. 44 Md. 436 (447)*.

Mr. Bishop, in his work on contracts, page 607, says:

"Judicial process interrupting the doing of a thing and rendering it impossible will excuse performance," citing *Walker vs. Fitts, 24 Pick. 191; Lord vs. Thomas, 64 N. Y. 107, Leopold vs. Salky, 89 Ill. 412., etc.*

In the case of the *People vs. Insurance Co. 91 N. Y. 174,* it appeared that a party had entered into a contract with the company to give his services for a certain consideration, and that the company was afterwards dissolved by the State. In an action brought by an agent who had been employed by the company against the receiver of the company, it is said: "What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within contemplation of the parties and must be deemed an unexpressed condition of their agreement.

If the act of 1871, and the proceedings of the County Court of Pike County thereunder, constituted the terms of a contract between Francis Palms and the owners of lands in the district, or any one of them, then the performance of that contract was rendered impossible by the action of the Supreme Court of the State of Illinois in the Updike and Webster cases. The contract could not be carried out by either party in a mode contemplated by the statute. That mode was not only important to the land owners, but was of the very essence of the agreement itself. If the method of collection provided in the statute could be pursued, and if a lawful right of way for the levee could be secured, all the lands in the district would have been forced to contribute in proportion to the benefits received, and

the purpose of the law, and of the parties who accepted it, could and would have been accomplished. Had the law remained in force they would have obtained what they expected in entering upon the enterprise.

The power which the statute purported to give them was not only the inducement which prompted the land owners, but the consideration on which the implied promise rested, and that failed. The conditions with which the land owners were confronted under the decisions of the Webster case and the breaks in the levee, was one of the most difficult problems that ever confronted men who were trying to build up a new community. The system or plan on which they relied had failed. The Mississippi river had devastated their lands. Without means to compel contributions to the completion and preservation of the levee, the entire enterprise instead of proving a benefit must necessarily prove a curse. They had invested their means of support in the district and were thus left without any protection whatever. The testimony is perfectly conclusive that not one of them would have moved a finger in establishing the district had he for a moment supposed that the assurances given by the statute of all means of preservation in the future was to be withdrawn.

Section 34 of the act of 1871 (R. p. 401-2) provides that the commissioners, when appointed and qualified, may do all the acts that are necessary in and about the surveying, laying out, constructing, *repairing*, altering, enlarging, cleansing, protecting and *maintaining* any drain, ditch, levee or other work for which they shall have been appointed, etc.

Section 39 of the same act gives the power to levy one or more new assessments, "on the suggestion of the commissioners, or any owner or occupant of lands affected by any work authorized in this chapter, either to supply any deficiency in any other assessment, to repair, alter, enlarge, cleanse, *protect or maintain* any drain, ditch, levee or other work constructed by virtue of this chapter." The purpose of those land owners who signed a petitition for the organization, as expressed in their petition to the County Court of Pike County was "for the purpose of constructing a levee," of "repairing, enlarging, *protecting and maintaining* said proposed levee." (R. p. 445). This they could not do when the act of 1871 failed.

Counsel for petitioners cite and rely upon certain cases decided by the Supreme Court of Ohio, which are: *State vs. Mitchell, 31 Ohio State, 592-610; Columbus vs. Sohl, 44 Ohio St., 479*; *Columbus vs. Slyh, 44 Ohio St., 484;* and *Tone vs. Columbus, 39 Ohio St., 281.* They all arise under the same act and relate to the same improvement—namely, the paving and improvement of a street in the city of Columbus. In the case of *Tone vs. Columbus, supra,* it was held that a party might be estopped from questioning the *validity* of the statute under which an assessment was made, but not estopped from questioning the regularity of the proceedings of the city council. A part of the language of the court upon this question is as follows: "Infirmities in the public statute he (the petitioner) may be presumed to know, but not in the proceedings of the council whose acts, as we have seen, he has a right to presume are regular." (Page 304.) In other words, he may be

estopped to question the entire want of power to do the act in question, but not the regularity of the proceedings of a city council. We do not know what respect this court may see fit to give to reasoning which arrives at such conclusions; but assuming that the reasoning is correct as applied to that case, it does not apply to the case at bar.

In all of those cases the facts were that the improvements were made *as contemplated* and that the petitioner in the Tone case asked to have it made. He received all that he asked for, and then applied to a court of equity to be relieved from the assessment. There is no suggestion in the opinion that he would have been held to be estopped or required to pay the assessment had he not received the full benefits intended to be conferred by the statute. The language of the court indicates that the receipt of the consideration which induced the action of the party held to be estopped was a very important element in the case. It is said: "When the above named requirements (signing the petition, etc.) are found *and it is shown* that the property owner has been benefited by the improvement, *at least to the extent that he has been thus benefited*, he will be estopped to deny his liability to pay." It will be found that there is no evidence in the record of the case at bar of any actual benefits conferred upon the several defendants by anything that was done for them or their lands under the act of 1871, or that was derived from the payment of Mr. Palms' money to the contractors. It is further stated in the opinion of the court in the above case that "It may be suggested here that while there was a want of power to order this improvement under the

act in question, and perhaps a total want of power to issue the bonds, there was ample *power vested in the corporation* to make the improvement and assess the cost of it under valid existing law," citing *Hitchcock vs. The City of Galveston, 96 U. S., 341.* These Ohio cases therefore all apply to that class where the improvement was made by a legally subsisting corporation, and one which had ample power under an existing law to make the improvement and to assess the cost of it.

Hence we discriminate these cases from the case at bar in these two important particulars:

First.—There was power in the city of Columbus to levy the assessment in question, altogether aside from the particular statute under which the bonds involved were issued, and the cases were between the city which issued the bonds and directed the improvements and the property owners.

Second.—The property owners who were held to be estopped had received the full benefit of what they had asked for, precisely to the same extent as though every provision of the law had been valid.

Great stress seems to be laid by counsel upon the case of *State vs. Van Horne, 7 Ohio St. 327.* A brief statement of the facts of the case will make it clear that it is not an authority on the case at bar. This was a proceeding by *mandamus* on the relation of certain owners of bonds against the state auditor to compel him to issue a warrant on the treasurer in favor of such bondholders for certain money raised by taxation and then in the treasurer's hands to pay interest on the bonds. Neither the

taxpayers nor the municipality were parties to the proceeding. The question of estoppel was not properly before the court. The bonds in question were issued in aid of a certain railroad on a vote taken and certified by the officers of the municipality to have been regular. The railroad was constructed, and the taxpayer received the *full benefit* of the bonds for which they had voted—received and retained the full consideration which had induced their action.

Moreover, the statute under which the bonds were issued contained a provision which made the records relating to the issue and the recitals in the bonds *conclusive* evidence that they were issued in accordance with the act. The only question raised against the validity of the bonds was whether the vote to authorize their issue could properly have been taken before the road was constructed, or whether it must have been taken afterwards. The court held that the taxpayers had received all that they asked for, and that the acts of the agents of the corporation in certifying to the regularity of the election, the issue of bonds, etc., would estop the agents of the taxpayers, as against innocent purchasers for value, and that the taxpayers themselves could not, under these circumstances, repudiate the acts of their agents. Evidently, this case has nothing to do with the general question of estoppel. It was a question of agency under the provisions of the particular statute in question.

Counsel also cites two Pennsylvania cases, *Bidwell vs. Pittsburg, 95 Penn. St., 412* and *Dewhurst vs. Allegheny, 95 Penn. St., 347*. These cases both arise under the same statute. The act related to the improvement of Penn avenue and certain

other streets named in the city of Pittsburg, and provided that its provisions might be extended to other streets on the petition of a majority of the property owners whose property fronted thereon, to be addressed to the city council. Under this act a petition was presented to the council signed by Bidwell and others, asking for the pavement of Ellsworth avenue, according to the provisions of the act, and five commissioners were selected who did the work, made the assessments, etc. Bidwell was not only one of those who signed the petition to the city council under which the paving was authorized and done, but he was also one of the commissioners who levied the assessments on the abutting property, including his own, sold the bonds, received the money and *completed the work therewith, as contemplated* in the petition and ordinances. It was held that the act in so far as it applied the frontage rule of assessment to rural property was unconstitutional, and the property in question was rural property; but it was also held that Bidwell was estopped from denying the applicability of the act to Ellsworth avenue.

The cases are by no means analagous to the case at bar. Bidwell actually received the money and improved his property to precisely the same extent as though the law had been constitutional in every respect. He received full value for the assessments imposed upon it by his own action. The court expressly refers to this question of value. They also, as in the the Ohio cases, refer to the matter as a contract and use this language: "It has been held that where a party has acted upon a particular construction of a contract which has been acquiesced in by the other, the latter is estopped from contest-

ing it as the proper construction." The petitioners in the case at bar, in asking for the formation of the district, not only refer to the construction of the levee, but to its *maintenance* by a system of assessments. In the case of the improvement of a street by paving, the entire benefits are conferred when the paving is done in accordance with the specifications, and the full consideration for the act of the petitioner has then been received. In the case at bar the building of the levee, even if it had been properly constructed in the first instance, was but a small part of the consideration which moved a few of respondents to apply to the County Court of Pike County for the formation of the district. The more important element, the maintenance of the system, completely failed them. The case of *Dewhurst vs. Allegheny* arose under the same statute, and is the same in effect as the Bidwell case.

Counsel also cite and rely upon several Indiana cases. The first of these cited is that of *Ricketts vs. Spanker, 77 Ind. 371.* This was a bill in equity by taxpayers to enjoin the collection of a tax to pay bonds for the construction of a gravel road. The act under which the assessment was made was held to be insufficient and there was no occasion to apply the doctrine of estoppel. The estoppel referred to in the opinion of the court is "an estoppel by judgment," (based upon the assessment proceedings), * * * and it is said, "The judgments and orders pleaded are a complete estoppel," (362). It has no reference to an estoppel *in pais.*

Another Indiana case is that of *Tabor vs. Ferguson, 109 Ind. 227;* but it will not appear that any question of estoppel

was raised by the pleadings, or was involved, in that case; it merely related to a question of notice.

The case of *Flora vs. Klein, 89 Ind. 208*, was an action at law, decided on demurrer to the declaration, and merely held that the language of defendant as set out in the declaration was sufficient to constitute a contract to pay for the work in question.

In *Nevins vs. Otter Creek Drainage Co., 36 Ind., 189*, there was no question of constitutionality, but merely of irregularity in the assessment for the construction of a ditch, which was made at the request of the defendant.

In the case of *Kellogg vs. Ely, 15 Ohio St., 64*, cited by counsel, the court merely decided that it would refuse complainant the relief prayed for by him of *injunction* against certain assessments, without directly passing upon any question of estoppel.

None of the cases cited by counsel for appellant, and none to be found, establish the doctrine of estoppel in a case like that at bar, where there is no fraud on the part of defendants and no misleading word or action addressed to the complainant on which he has a right to rely, and on which he has relied and acted. The utmost extent to which these cases go is to hold that under certain states of fact an unconstitutional law, and the proceedings under it, would be treated as in the nature of an implied contract, under which the party to be estopped had received *the full consideration* which had induced his action.

The consideration which induced certain defendants to sign the petition for the organization of the district (for example) was not the money which Mr. Palms or any other purchaser of bonds advanced to the contractors (for they had nothing to do with him, and did not receive his money); but it was the supposed grant of *power* by the statute to accomplish the complete purpose of reclaiming their lands by the construction and *maintenance* of a levee by a system of special assessments to which all lands in the district could be compelled to contribute —and not merely that the work should proceed half way, an embankment of sand and logs be constructed, and then that they should be abandoned to the mercies of the Mississippi river, without a law or other means for their protection. If this were a case of an express contract, based upon the terms of the Act of 1871, the defendant could plead failure of consideration.

IX.

AS TO MAINTENANCE AND SUBSEQUENT APPROPRIATION OF LEVEE BY THE PRESENT DISTRICT, OR ANY OF APPELLEES.

The levee was constructed in a sort of way, but never was really sufficient or nearly so. The first flood destroyed its usefulness. The land owners were left without protection. They tried every way to raise means for its preservation. By voluntary organization they succeeded in inducing the owners of about one third of the land in the district to execute a deed of trust on their lands, and on this a large sum was raised. But this was a failure. After years of effort an amendment to the con-

stitution was obtained by vote of the people of the State, an act of legislation was passed, a new district was formed, and a new debt was incurred to accomplish what the old law failed to do.

Did the subsequent expenditure of money in order to save what remained of the old levee injure anybody? If Mr. Palms had any claim on the work he was benefitted. If he had no claim his interests were not affected. Certainly what was done years after he obtained his bonds did not induce him to buy those instruments, nor mislead him, or induce him to put himself in any worse position.

But we maintain that what occurred after he bought his bonds did not concern him in the least. Subsequent appropriation of the fruits of a man's money, sometimes entitles him to follow those fruits. But Palms' money did not build the old levee, nor enter into it. He had no lien on it whatever, either in law or equity. In fact he was an utter stranger to it.

Litchfield vs. Ballou, 114 U. S. 190.

This case is cited with approval by Mr. Justice Harlan, in the opinion of the Circuit Court of Appeals, Trans. 548-9.

X.

MR. PALMS OR HIS EXECUTORS CANNOT BE SUBROGATED TO ANY EQUITIES OF THE ORIGINAL CONTRACTORS.

Granting, for the purpose of this argument, that the contractors might, under certain circumstances, pursue or obtain

a lien upon the work which they had done or paid for, can Palms be placed in their shoes?

The answer is contained in the case of *Aetna Insurance Co. vs. Middleport, 124 U. S., 534.*

This case is exactly parallel, so far as relates to the principle of subrogation.

In that case the town of Middleport had issued certain bonds to aid in the construction of the railroad; the road was constructed and the bonds delivered to the railroad company in payment of the work and afterwards sold to complainant. They were held invalid by the Supreme Court of the State of Illinois, and a bill was filed in the United States Court to enforce their collection, the complainants seeking to be subrogated to the rights of the railroad company, to enforce the contract evidenced by a vote of the town appropriating the amount involved to pay for the railroad, and the acceptance and fulfillment of the contract by the railroad company. It was decided, in substance, that the complainant, having bought the bonds as negotiable securities from the railroad company, could not be substituted to any rights which it might have had against the defendants; that no right of subrogation existed; that it could be applied only in cases where a junior incumbrancer was forced to pay off a superior lien for the protection of his rights, or in some similar case; and that a mere volunteer was not entitled to claim the right.

In the case at bar no bonds were ever sold by the commissioners of the drainage district to Francis Palms or any one repre-

senting him. (Trans. p. 372.) They were delivered to the contractors who constructed the levee (Trans. 80-81) and after each portion of it was completed and accepted, so far as it ever was completed, and were taken in payment at ninety cents on the dollar of their face value. (Trans. 366-7.) All of the more important alleged equities averred in the bill existed before Mr. Palms obtained his bonds. We refer more particularly to all acts of any land owners for obtaining the enactment of the act of 1871; the signing and filing of the petitions under which the work was undertaken and the bonds issued; to those who voluntarily paid their interest for the years 1873 and 1874; those who had notice of the assessments and did not object to them, and those whose lands would be benefitted by the building of the levee and who offered no objections, and those claiming under these various classes. All these acts were done, as we have said, before Mr. Palms obtained his bonds, and if they created any equities it was in favor of the original contractors who built the levee. Mr. Palms cannot assert such equities unless he can be subrogated to the rights of said contractors, and this he cannot do under the authority of the above case. In both instances corporations undertook the construction of certain works, and employed contractors to do the work. In both cases the contractors were paid by bonds, issued by the corporations. In both instances the bonds were held practically void as to the corporations issuing the same. And in both the purchasers of the bonds claimed subrogation to the rights of the contractors from whom the bonds were purchased. But in the Middlefort case the Supreme Court of the United States held that the purchasers of the bonds were mere volunteers,

who had no interest which entitled them to be placed in the shoes of the contractors. They were mere volunteers, with no such relations to the parties as would entitle them to subrogation.

Admitting, for the purpose of the argument, that if the contractors who built the Say Levee had not been paid, they might have claimed an equitable lien on the work itself, certainly, Palms, who bought the bonds, had no such right. The bonds were only issued as against each section of the work on its supposed completion. Therefore, not a dollar of Mr. Palms' money built any part of the levee. By the sale of the bonds, the contractors indemnified themselves for the work done, but that no more gave Palms a lien on the work than a man might acquire by lending money to another for the purpose of paying off a mortgage. The case last cited is absolutely conclusive on this point.

It therefore follows that Palms was an entire stranger to the levee, and its preservation or appropriation by any person whomsoever did not concern him. Had his money built it, or had he any kind of lien on it, he might say, with some show of reason, that the land owners, who afterwards appropriated a part of it, estopped themselves to dispute the collection of assessments. But Palms had no relation to the levee, and therefore the use that was made of it after he obtained his bonds, gave him no rights whatever. In fact, the equities of Mr. Palms must be determined from the condition of things existing when he obtained the bonds, as those alone could influence his action, and upon those alone could he rely.

Even if Mr. Palms' money did enter into the construction of the levee, (which we deny), yet it was intermingled with that furnished by hundreds of private individuals, by the new levee and drainage district, by three railroad companies, and $50,000 expended by the United States Government; so that neither the money nor its product could be specifically identified, and no lien could be given for it, under the authority of *Litchfield vs. Ballou, 114 U. S., 190.*

But, if we were to concede for the purpose of our argument, that the complainants can come into this court and occupy the same position that the original contractors might have occupied, yet they cannot do so as innocent purchasers without notice, for we have already shown that the so-called bonds were not negotiable securities under the law merchant, and moreover, they contained on their face a reference to the only authority under which they were issued, which was notice to purchasers of their illegality. So that, if complainants as purchasers of the bonds can come into court at all to enforce their supposed equities, they are in no better position than the original contractor would have been and are subject to any equitable defense which could have been made against a suit brought by such contractors. If the contractors were now seeking to enforce their claim they would be confronted by the mass of evidence contained in this record, a small part of which is referred to in our statement of facts, showing that the levee was very imperfectly and even fraudulently constructed by them; that nearly all of the early breaks were caused by such faulty construction, resulting in a loss to

the land owners many times greater than the original cost of the levee itself. It is shown that these losses amounted to at least $2,300,000 (Trans. pp. 205, 157-58, 314); and that the losses in 1876 alone were at least $1,000,000 to personal property (pp. 116 and 121), not including the depreciation in real estate and injury to improvements.

XI.

THE LACHES OF FRANCIS PALMS AND PETITIONERS.

Aside from all other grounds of defense, the laches of Francis Palms during his lifetime, and of his representatives since his death, constitutes a complete defense in this case, and is relied upon as such in the answer of respondents. The original bill of Francis Palms against the commissioners of the drainage district was filed May 4, 1878, and the last order entered in that cause July 7, 1880. No further steps were taken during his lifetime. He died Nov. 24, 1886. The supplemental bill was not filed by the present complainants until April 22, 1889. Therefore, if the present bill be regarded as supplemental to the original bill, as contended by counsel for petitioners, then their action is barred by the failure to prosecute with due diligence a suit already instituted. This court said in *Johnson vs. Standard Mining Company, 148 U. S. 360 (370)*: "It has been frequently held that the mere institution of a suit does not in itself relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun," citing with approval a number of authorities from various courts.

But we insist that no suit was instituted against the present defendants until the filing of the supplemental bill, in 1889, and the service of process thereafter. These defendants were not parties to the original proceeding. The only defendants were the original commissioners, of whom at present only Mr. George W. Jones survives. These land owners were in no way represented by the commissioners, as we have shown in another part of this brief—that is, they were not "parties by representation." It seems clear to us that neither the complainants nor Judge Drummond understood that they were so represented when the orders were entered giving the complainants permission to bring the land owners before the court. The case, then, as to these defendants, is this: That in the year 1876 the Supreme Court of Illinois held the Act of 1871 unconstitutional and the proceedings thereunder void; that if Mr. Palms had any action at all, it then accrued; that he was given a right to proceed against these defendants by the orders of 1879 and 1880, and that a period of at least nine years elapsed before any of said defendants were brought before the court. We will not repeat what has been heretofore said with reference to these former "decrees" so-called. They are but decretal or interlocutory orders; but if they had the force and effect of solemn judgments and final decrees, that force would have ceased long ago, for no attempt was made to enforce them until the expiration of their lives as statutory liens.

In this state, neither a judgment at law nor a decree in chancery has any force against third parties after the lapse of seven years from its rendition.

Secs. 1 and 6, Chap. 77, Rev. Stat.
2 Starr & Curtiss, 2d Ed., p. 2324 and 2334.

An action to recover real estate is barred in this state, first, by seven years' residence thereon (construed to mean by the owner or his tenant, etc.,) under a title of record from the state or United States; secondly, by seven years' adverse possession under color of title and payment of taxes; and, thirdly, as to unoccupied land, by seven years' payment of taxes under color of title.

Rev. Stat. of Ill., Chap. 83, par. 4, 6 and 7.
2 Starr & Curtiss, 2d Ed., pp. 2604-5 and 2618.

Almost all defendants have proved adverse possession under the above statute, or at least a very large proportion of them. Ever since the land owners ceased paying levee assessments in 1874 and 1875, and denied any validity in the assessments or bonds (as they understood was settled in the Webster and Updike cases), they have been in adverse possession to all parties claiming a lien by virtue of the assessments or bonds. When this adverse possession was continued for seven years, either under tax deed or any other deed, regular on their face, accompanied by the payment of taxes, the bar of the statute was complete. It has been frequently decided that a tax deed is sufficient "color of title" in this state, if regular on its face.

Stubblefield vs. Border, 92 Ill., 279;
Thomas vs. Eckhardt, 88 Ill., 593.

The defendants in this case do not claim "from any common source of title" with complainants, and are affected by no principles based upon such a situation of parties.

Moreover, the doctrine that no adverse possession can begin to run until the right of action accrues, can have no bearing on this case; for Mr. Palms was given permission to proceed against the land owners in 1879, and whatever right of action he had, *then* accrued, if not before, and he and his representatives did not avail themselves of such permission for nearly ten years.

If the present bill is to be treated as a bill of review, as it states on its face, then it could be brought only within the time allowed for the bringing of a writ of error, to-wit:—five years.

Bell vs. Johnson, 111 Ill., 374:
Allison vs. Drake, 145 Ill., 511.

It is a general rule, subject to few exceptions, that a court of chancery follows the law in applying the statute of limitations—that is, that a cause of action which would be barred at law will also be barred in equity, and where there are exceptions a sufficient equitable excuse must be alleged in the bill, and sustained by the evidence, to account for and justify the delay.

Walker vs. Ray, 111 Ill. 319-20, and cases cited.

But equity goes further than the law, and refuses relief on the ground of laches in many cases where there would be no bar to an action at law, usually founded upon some change in the conditions or relations of the parties or the subject matter of the suit.

Id. 322.

Various decisions of this and other courts are reviewed in the opinion rendered by Mr. Justice Brown, in *Gallagher vs. Cadwell, 145 U. S. 368*, and in summing up the effect of these cases it is said: "They all proceed upon the theory that laches is not like limitations, a mere matter of time; but *principally* a question of the inequity of permitting the claim to be enforced--an inequity founded upon some change of the conditions of the property or the parties." (P. 373.) This language was approved in *Penn, etc. Ins. Co. vs. Austin, 168 U. S. 696-7*, in which relief was denied after a period of less than five years. *Johnson vs. West Ind. Transit Co., 156 U. S. 647-8.*

Various authorities upon this branch of the subject are cited in the opinion of the court in *Johnston vs. Standard Mining Company, supra, (370-1)*, and it is there said: "The law is well settled that where the question of laches is an issue, the plaintiff is charged with such knowledge as he might have obtained upon inquiry, provided the facts known by him were such as to put upon a man of ordinary intelligence the duty of inquiry." (370.) We shall show hereafter that Francis Palms was not only subject to the "duty of inquiry," but that he actually knew the existing situation in the drainage district. It is further said in the above case that "Where property has been developed by the courage and energy and at the expense of the defendants, the courts will look with disfavor upon the claims of those who have lain idly by while waiting the results or this development, and will require not only clear proof of fraud but prompt assertion of the plaintiff's rights." (371.)

The duty of prompt diligence in prosecuting a claim against property of a speculative value, is clearly set forth by Mr. Justice Miller in *Twin Lick Oil Co. vs. Marbury, 91 U. S., 587 (592).*

The same principles have been frequently announced by the Supreme Court of Illinois. In *Williams vs. Rhodes, 81 Ill., 571 (588)*, it is said: "Numerous cases have been decided by this court where delay for a much less period than that fixed by the Statute of Limitations has been held to preclude the right of a party to bring suit. In such cases, it is said, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, the prosecution of the suit; and no general rule can be laid down for the guidance of the court in every case. A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title to relief where the property is of a speculative character, or subject to contingencies, or where the rights or liabilities of others have in the meantime been varied." Similar language has been used in a later case, *Walker vs. Warner, 179 Ill., 16.*

Complainants' bill in itself shows the property in the levee district was of a highly speculative character, worth 50 cents per acre in its natural state, and an average of $25.00 an acre if fully reclaimed (Trans. p. 42-3.) The record is full of evidence showing the extremely hazardous nature of the enterprise, the numerous breaks in the levee, the varying value of the property at different times, and the different contingencies to which it was subjected. It also shows that it was changing hands from time to time, and all these circumstances imposed

upon Francis Palms and his representatives the duty of prompt diligence in prosecuting their cause.

An amount of money has been expended since 1876 in the construction of the present levee by the land owners, by the present drainage organization, by the United States government, and by three railroads, much in excess of the amount expended by the original organization, as shown in our foregoing statement of facts.

No excuse whatever is averred in the bill, or shown in the testimony, for this long delay. No negotiations are proven looking toward a compromise until about the time of the filing of the supplemental bill. An illustration of the changes that have occurred in the ownership of the property is found in the fact that of the 116 signers of the original petition to the County Court of Pike County (Trans. 146) only 37 were living and made defendants to the present bill in 1889 (Trans. 26), and the evidence shows that a number of these had died before the testimony was completed (in 1893), a number have since deceased, and many have disposed of their entire interest in the drainage district.

In this connection we will call attention to the fact that there was no record or index in the office of the Recorder of Deeds of Pike or Adams County showing either of the assessments under the original drainage district, or any reference to them, as required by Section 28 of the Act of 1871 before such assessment could be notice of the lien thereof to all persons, as shown in our foregoing statement of facts.

While no justification for this delay is attempted in the bill, the solicitor for petitioners seeks to explain it on the ground that the bonds in question did not begin to mature until 1882, and were not therefore barred at the time the supplemental bill was filed. A sufficient answer to this is to say that this cause is not based upon valid legal obligations, as to which the owner might properly wait to bring his action until any period prior to the expiration of the Statute of Limitations. We think that we have sufficiently demonstrated in a preceding part of this brief that the so-called bonds have no legal existence as such. This is, in effect, completely admitted by Mr. Palms and his representatives when they come into a court of equity and ask equitable, rather than legal relief. If the bonds are valid, as such, there is a complete remedy at law, and complainants have no standing in a court of equity.

But another sufficient answer to this claim that Mr. Palms might have delayed the bringing of any action until his bonds matured, is the fact that *he did not do so.* He filed a bill to collect both his principal and interest. He asked in that bill for "an accounting for the *moneys advanced* by complainants to said commissiorers as aforesaid and interest thereon." (R. pp. 13, 427); and made the following a part of the prayer to his bill: "And when the amount due to your orator *for principal and interest* as aforesaid is well ascertained, may it please Your Honors to order and declare that your orator is entitled to a lien upon the said levee," etc. (R. p. 428.) In the decretal order of March 13, 1879, leave was given "the complainants * * * * to go before the master and produce their

said bonds and coupons and interest thereon, and make proof of the amount due them of *principal and interest* on account of such loan. (R. p. 437.) The master's report is not printed in the record, and we have not at present access to it, except so far as it is stated in the order of July 7, 1880. It may be true that its calculations related only to interest, but complainant produced his bonds, the amount of which was not disputed, and he was again, by this order, given leave to file a bill. (R. p. 441.) The total of the master's findings of interest due was $304,908.26, of which the sum of $221,228.26 (R. p. 439) was found to be due Francis Palms. This was certainly a sufficient sum to test the question of the liabilities of the land owners.

Judge Drummond, in giving complainants permission to prove up principal as well as interest, doubtless took the view that if the bonds were not valid as legal obligations, complainants might have some equitable relief based on the original consideration invested in the bonds. In this view, whatever right of action there was, if any, accrued when the money was parted with. This was the view taken by the learned Judge who decided the Middleport case in the Circuit Court. He held, in substance, that the bonds being unconstitutional, the right of action accrued for the original consideration when the money was parted with, and that the suit was barred by the five years' statute of limitations.

Aetna Ins. Co. vs. Middleport, 31 Fed. 874.

But whatever may have been in the mind of Judge Drummond, this record shows that on March 13, 1878 Mr. Palms, with certain other complainants, did file a bill to enforce the lien for

both principal and interest; that on July 7, 1880 he had permission to bring all the land owners into court to test the question of their liability, and that he did not do so; nor did his representative do so until after a period of nine years had elapsed.

But the petition for the writ of certiorari filed in this cause undertakes to give another reason for the long delay, which is as follows: "*In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners were expending money in repairing*, and it would have been unreasonable for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due." (*Pet. pp. 45 6.*) Here we find the real reason for this long delay. Mr. Palms knew that "there were extensive breaks in the levee in 1880, followed by more in 1881;" that "the land owners were spending money in repairing" these breaks; that, as averred in his bill, the lands were not worth to exceed fifty cents an acre (or a total of $50,000.00), and were wholly inadequate security for his bonds, unless a good and sufficient levee was constructed (R. p. 42).

The question has been heretofore treated as one of laches; but the fact is it was not so much laches as a deliberate lying by until the unwary land owners should have, by new and valid proceedings, and by new assessments upon their lands, made complainants' security good. The petition has, with almost admirable frankness, told us the cause for this long delay, which was not oversight nor neglect. The admission is that the filing of the bill was purposly delayed until the land owners had, by fresh contributions, restored the levee and so made good the complainants' security.

If we now turn to page 2 of the petition, we find this statement: "It has remained unbroken since 1888 and has grown as solid as the natural embankment." The foregoing citations from the petition are very significant, when taken in connection with the history of the drainage district and the conduct of Mr. Palms with reference to the proceedings of the land owners. Early in 1876 the Supreme Court of Illinois decided that the proceedings under the Act of 1871 were void, and in April of that year the levee was broken in numerous places and the land reduced almost, or quite, to its value in the state of nature, as shown by references in our opening statement. Immediately thereafter individual land owners went to work filling the breaks and in 1877 entered into a voluntary trust deed embracing about 30,000 acres of land in the district for the same purpose. Mr. Palms might have filed his original bill immediately after the decision of the Supreme Court in 1876; but he waited for two years, until the levee had been restored, and filed his bill May 4, 1878. This was prosecuted while matters seemed to be going favorably to the land owners. The foregoing admissions show, which is fully established by the evidence, that there were numerous breaks in the levee in the year 1880 and in 1881, by which the lands were again greatly reduced in value and the confidence of owners and investors in their ultimate reclamation very much shaken. Therefore Mr. Palms again takes no action.

Meanwhile a new drainage district was organized in 1880 under the provisions of the Act of 1879, following the constitutional amendment of 1878. Large assessments were levied

upon the lands aggregating hundreds of thousands of dollars, and meanwhile Mr. Palms did nothing, and allowed the land owners to go forward, spend their money and increase the value of the property. He died in November, 1886, and there would seem to be no good reason why his executors might not have proceeded immediately, if they intended to do so at all. But the levee broke again in the early part of 1888, and the present complainants waited until additional assessments of $150,000 had been levied upon the land before filing the present bill. All this has the appearance of premeditated delay, while, as stated in *Johnson vs. Standard Mining Co.*, *supra*, "Property has been developed by the courage and energy, and at the expense of the defendants." These expenditures would never have been made if Mr. Palms had filed his supplemental bill when he had permission to do so.

The conduct of Mr. Palms after July, 1880, was such as to induce owners of lands in the district who knew of his claims, to believe that they had been abandoned, and the record shows that very many of the landowners knew nothing about his suit. It is not a case of a "sleepy eye," either on the part of Mr. Palms or of the present complainants, but of watchfulness for an advantage. Mr. Palms knew the risks of the enterprise, and the struggle that was going on to reclaim these lands, and having rested upon his rights with such knowledge for a period of about nine years, we earnestly insist that not only the provisions of positive law, but that every consideration of justice and equity, demand that he and his representatives should not now be permitted to enforce his claims against those by whose

energy, courage and expenditure the lands have attained whatever value they now possess.

The opinion of the Circuit Court of Appeals rendered by Mr. Justice Harlan in this cause is not expressly based upon the ground of laches; but it is very clearly indicated that in the opinion of the court this would have been a sufficient defense had no other existed, as appears from the following language: "He (Mr. Palms) was given leave to file a bill by an order entered in 1879, but he died in 1886 without availing himself of the privilege so given, although a large amount of interest was then due, and although almost $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a Court of Equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate because it is provided by statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the decree which becomes a lien, except upon the renewal of the same by *scire facias*, and that an action to recover real estate shall be barred by seven years' adverse possession under color of title and payment of taxes, or as to unoccupied land by seven years' payment of taxes under color of title. (*See S. & C. Ill. Stat., C. 77; Sec. 6; C. 83, Secs. 4, 6 & 7 pp. 1386, 1538,*" etc.) (Trans. p. 551.)

As we have remarked above, this enterprise was an extremely hazardous and speculative one, so far as the land owners were concerned, practically to the same extent as mining lands or oil property. It was also hazardous as to Mr. Palms, and he deliberately accepted that hazard. He obtained a concession of not less than ten per cent. from the face of the bonds in making his purchase, and was to receive ten per cent. upon their face value. For this valuable consideration he took the risk knowingly. He sent his own counsel, Mr. John Atkinson, to Illinois to investigate as to the validity of the bonds in question, which he contemplated purchasing from the contractors. (*R. p. 371.*) The opinion of Col. Atkinson was obtained by him (but addressed to John Heffron, Esq., one of the bondsmen for the contractors), and shows that "July 22, 1871, (1872) the Commissioners filed the assessment roll and asked for its confirmation. Two appeals were taken, as appears by the files, and *are undetermined.*" (*R. p. 457.*) The report of Col. Atkinson was submitted to Hon. G. V. N. Lothrop, and by him approved. These objections were prosecuted from the County Court to to the Circuit Court and thence to the Supreme Court of the state, where they were held invalid. (See, also, R. 249.)

The bonds in question were not even negotiable instruments within the meaning of commercial law. True, they were made payable to bearer and might have been so assigned as to transfer the legal title, but they did not contain the elements of paper under the law merchant. They were not payable absolutely, but only out of a particular fund, as shown by the face of the bonds. (Trans. 469-70.) They impose no absolute per-

sonal liability, either on the district or on the commissioners. If the fund arising from the assessment should be exhausted, there would be no means of meeting the unpaid balance on the bonds.

1 Randolph on Com. Paper, p. 140, Sec. 107, and cases cited.

Turner vs. Peoria, etc., R. R. Co., 95 Ill., 134 (144-6).

3 Kent Com., 76.

Had the petitioners been willing to rely upon their bonds as legal instruments, valid under the law, independently of any individulal consent or dissent, they might fairly contend that they were not bound to move until all the bonds matured, and until such period thereafter as was allowed by the statute of limitations; but they were not willing to rely on any such proposition. They have sought the aid of a court of equity and pray a lien for the security of the bonds by virtue of a judicial decree. The facts which they now claim entitle them to a decree were open to controversy. The very term *in pais* presupposes conditions existing "in the country," as distinguished from the record or the law. The circumstances of the district and the *personnel* of its people were constantly changing. A broad controversy was liable to be raised, involving facts extending over a series of years, and became more and more difficult to establish. Witnesses were liable to die, and no doubt were dying. If Mr. Palms desired to obtain a decree giving him a lien, and to found the same upon the personal acts of individual land owners, and to make the same notice as powerful as a a writ of injunction to all subsequent dealers with the property, then he was bound under every principle of equity to proceed at the

earliest possible moment. The court had permitted him to do so. He was not content to rely on the law as giving him a valid legal claim against the district; but he desired to rest upon a new and distinct cause of action, namely, the promise and contract of the land owners. Such a claim would be barred in this State by the five-year statute of limitations.

Another reason for requiring prompt action on the part of Mr. Palms, if any was to be taken by him, is the fact, disclosed by his bill, that he knew of the decision of the Supreme Court of Illinois in the Updike and Webster cases, and that the land owners were relying on those decisions for their protection. Practically every one in the district was familiar with the decisions of the Supreme Court in those cases, and especially with the latter, as it arose in Pike county, was tried in its courts and its results were known to every one. Those who contributed to the repair of the old levee or the construction of the new one, or did anything to improve their property, acted on the belief that those decisions constituted a part of the law of the land upon which every citizen might depend for the protection of his property rights. They affected the rights of every owner of land in the district, and related directly to the entire subject matter of this suit. Therefore, if Mr. Palms sought to obtain a decree from the Federal Courts which would, in effect, set aside the rule of property established by the state courts in those cases, it was incumbent upon him to act with the utmost promptness.

But those cases apply with special force to the defendants who purchased their lands during that long period when Mr.

Palms did nothing to assert his rights, and prior to the filing of the present bill in April, 1889.

A reversal of the principle established in those cases amounts to the abrogation of a rule of property which had been in existence in the state for thirteen years prior to the filing of the present supplemental bill. The law as stated therein entered into and became a part of every contract for the sale or mortgage of land in the district during that period, the obligations of which cannot be impaired by subsequent legislation, or by a subsequent change of decisions. This has been established both by decisions of this court and of the highest court of Illinois.

In the case of *Douglas vs. Pike County, 101 U. S., 677*, this court said: "The true rule is to give a change of judicial construction in respect to the statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retrospective. After a statute has been settled by judicial construction that construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and the change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of legislative enactment." (*P. 687.*)

See, also, *1 Kent's Com., 476.*

This principle is fully sustained in *Harmon vs. The Auditor of Public Accounts, 123 Ill., Rep. 122 (136)*, and cases cited.

The land owners had a right to assume from the conduct of Mr. Palms, that he had abandoned any claim that he had ever asserted against the levee or the lands in the district.

Supposing when the people of the district were confronted with the necessity of doing the work over again, when by reason of the failure of the original structure they had lost more than three times the money invested by Mr. Palms and by the complainants put together, they had been told that they must again submit to the same extent of taxation to accomplish the same purpose and also pay the old assessments held void by the highest court of the state, does anybody suppose that they would have advanced a single step? Had this been proclaimed to them Mr. Palms might have looked to the lands, worthless as they were, but not a finger would have been raised by the people to save the levee or to save those lands, and no new purchasers would have invested in them. Moreover, under such circumstances, many land owners would have been unable to obtain, by mortgage or otherwise, the funds necessary for repairs. Therefore, we say, that if it had been the intention of Mr Palms to obtain a lien, or to establish an equity under the judgment of a court, and by reason of certain alleged acts of participation done by the land owners, or any of them, it was his clear, palpable and bounden duty to have proceeded at such time and with such promptness as would have given to the whole world notice of what he intended.

The owners of the lands had changed greatly; the years were doing their work; sales and mortgages, incumbrances and transfers were going on from week to week, and the currents

of life and death were proceeding as they always will proceed. Land owners were dying, heirs were born and the people were struggling to save their property, and still Mr. Palms paid no attention to this suit or the district; but merely waited for the people to reclaim the district and make his security valuable.

This was the time for Mr. Palms to file and prosecute his suit against the land owners defining those whose active participation was supposed to have rendered their lands liable, and defining the lands of each against or upon which he claimed a lien. By this means all concerned would have been notified—not by rumor, but by valid legal process. The records of the court would have notified everyone dealing with the lands of the fact that there were claims against the same, and the extent of such claims.

But nine years went by and not a word from Mr. Palms or his representatives. Then, after the constitution of the state had been changed and statutes had been passed affecting the lands and the interests of all the people; after probably four-fifths of the lands in the district had changed hands; when after long years success was practically achieved, Mr. Palms' executors proceeded not merely to revive his original bill, but to file a new one setting up an alleged equity which he knew from the beginning, if it ever existed at all. This they called upon the land owners to come in and defend themselves against.

We maintain, now, that before this last bill was filed Mr. Palms had in law and equity abandoned the lands and the levee and all claims that he had against the land owners and their

property. He remained silent when he should have spoken, and now he or his representitives cannot be heard to speak when they ought to remain silent. Petitioners invoked the principle of estoppel; we now invoke it against them.

We therefore earnestly insist that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

BENJAMIN HARRISON,

ASA C. MATTHEWS,

THOMAS WORTHINGTON,

Counsel for certain Respondents represented of record by them.

HARRY HIGBEE,

J. OTIS HUMPHREY,

Of Counsel.

No. 38

In the Supreme Court of the United States

October Term, 1901.

MICHAEL W. O'BRIEN, ET AL., EXECUTORS, ETC., OF THE LAST WILL OF FRANCIS PALMS, ET AL.,

Appellants,

vs.

JOHN G. WHEELOCK, ET AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

STATEMENT AND BRIEF

A. G. CRAWFORD,

For Appellees (Complainants in Error).

JEFFERSON ORR,

Of Counsel for Same Appellees.

The H. W. Rokker Co., Springfield, Ill.

IN THE

Supreme Court of the United States

MICHAEL W. O'BRIEN ET AL., Executors, etc., of the last will of Francis Palms, et al.,
Appellants,

vs.

JOHN G. WHEELOCK, ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT AND BRIEF.

May it Please the Court:

I am very much embarrassed in presenting cause of my clients, as I have no copy of brief of appellants in this court, and am compelled to state our position upon the assumption that counsel will make absolutely the same

argument to this court as was presented to the court of appeals upon the hearing in that court, hence, I will be compelled to use my brief in that case also.

The following statement may seem irrelevant and not responsive to the brief of appellant for the reason above stated:

STATEMENT.

While counsel for appellant has, I presume, here as in court of appeals, made an extended statement as to the pleadings, and a brief statement as to the facts, counsel must have inadvertently left out some things or overlooked them, one of the most important of which is as follows: On page 5 of his brief, referring to record pages 12 and 13, counsel omits the gist of the allegation of their own bill. The allegation is and was as follows: "That said commissioners acquired the legal title to the lands required for the site of said levee, and in reliance on said assessments contracted for the construction and completion of the said levee; and under the authority of said act and an order of said Pike County Court, *borrowed, upon bonds issued by them, $499,500, payable at different dates, with annual interest at ten per cent per annum, and sold the same, relying upon the acts of the General Assembly aforesaid, and confiding in the integrity and sense of justice of said landowners, of which said Francis Pulms purchased at par $202,500, and the commissioners used said money in the construction and completion of said levee;* that thereafter it became necessary to raise an additional sum to complete said levee, and a second petition was filed substantially similar to the first,

and like proceedings thereon were had, and an additional assessment was made for the sum of $148,500, under which said commissioners issued and offered for sale $148,-500 of bonds, which were all taken by said Palms, relying upon the facts above mentioned, and upon the further fact that the owners of the land benefited, had raised and furnished the defendants from and on account of the assessments upon their lands the moneys necessary to pay the interest coupons on said bonds maturing in 1873 and 1874 at par, and the money received by said commissioners therefor was expended in the construction and completion of said levee; that said commissioners constructed said levee and other works in accordance with said plans and surveys to such height that all of said lands were protected from overflow from the Mississippi River, and all said lands were reclaimed and rendered healthy and productive, and benefited to an amount greatly in excess of the sum assessed against them, *and the entire expense was paid by said commissioners with full knowledge of all the owners and occupants thereof out of the money advanced by said Palms and other purchasers of said bonds.*"

The above was the allegation in the bill when the demurrers were argued and overruled, and still remained until all of the evidence was taken, and the case was on call for argument on November 5, 1895, when, by leave of court, the following amendment to the bill was made: "On further motion of the complainants, by their solicitors, leave is granted them to file an amendment to the bill of complaint herein, *alleging that the complainants purchased*

the bonds from the contractors instead of the commissioners." (See transcript, bottom page 472), and counsel makes the same mistake on page 47 of his argument.

The demurrers were argued and overruled, with the allegation still remaining in said bill, that Francis Palms had bought the bonds from the commissioners, relying upon certain facts recited, and that the commissioners used the proceeds of the bonds purchased by Palms in the construction and completing of this old levee. Yet, after answers to the bill containing that allegation, and the evidence all taken, and the case called for trial November 5, 1895, the amendment was made, "that the bonds were bought of the contractors;" the allegation as it stood was not sustained by the evidence, and a new cause of action was alleged, with the apparent purpose of taking advantage of the law as to subrogation, or placing Palms in the position of the contractors, and contending that the contractors had certain equities, and that Palms was subrogated to the equities of the contractors as against the landowners; of which we will hereafter say more.

Counsel for appellants, we think, on page 33, is mistaken when he says, "It is proven beyond dispute that the location and construction of the levee was paid for by the proceeds of the bonds issued by the commissioners. (On Record p. 81)." An inspection of the record will show that Mr. Jones testified that *during the progress of the work, we paid for it under the contract with Skelsey, Fuller & Pierce, with levee bonds at ninety per cent of their value.*" The whole evidence in the case

shows that Mr. Palms bought these bonds from the contractors and their bondsmen, who finally completed the work, were paid in bonds — not bonds sold— and the contractors offered these bonds for sale, and Mr. Palms, after investigating the matter, and employing eminent counsel to investigate the legal question and advise him, purchased the bonds upon the advice of his attorneys as to the validity of the bonds; not that the lands in the levee district could be subjected to any equitable lien.

We think the counsel is mistaken in his statement on page 34 of the brief, "that the defendant, C. N. Clark, with money advanced for the payment of his expenses by other defendants named *and with the knowledge and approval of all of the then known occupants and owners of said lands*, procured from the legislature of the State of Illinois the passage of the act of 1871," etc. The evidence shows without contradiction that nearly every man in the lower end of the levee district opposed the levee from its inception. The case of *Webster* v. *The People* was only a test case taken up, by which a great many other cases then pending in the Pike County Circuit Court should be settled, and the testimony of nearly all of the witnesses as to the south end of the levee district is, that they understood from that time on, that the whole levee assessments and proceedings under the law of 1871 was void and of no effect.

We respectfully differ with counsel for appellants, in his statement on page 40 of the brief, "that the contract-

ors constructed the levee in accordance with the plans and surveys of the commissioners," etc. While Messrs. Corthell and Parkhurst, witnesses, substantially state that to be the fact, the testimony of many of the witnesses for the defense is altogether different, and shows that the contractors did not construct the levee as contemplated by plans and surveys.

Counsel for appellants, we think, is not warranted in his statement, on pages 40 and 41, in saying, "Not before the 26th day of January, 1887, did the commissioners cancel and release the trust deeds, and then this was done in pursuance of another and more extensive scheme for the continuance of said levee, *and the defeating of the complainants' testator from recovering the moneys furnished by him for the construction of the levee.*" Complainant's testator had then been dead for more than a year; the purpose for which these trust deeds had been given had long since ceased to exist, and were a cloud upon the titles of the landowners joining in same, hence, should have been released. How could they have been released for the purpose of "defeating complainant's testator from recovering moneys furnished by him for the construction of the levee?" He never furnished any moneys to the commissioners, or landowners, to do anything with. He bought, or took, no bonds from the commissioners, and furnished no money to them. He bought the bonds from the contractors, or, to be more accurate, from the bondsmen of the contractors, Hefferon and others, upon the market. This suit of *Palms* v. *Levee Commissioners*, was and had been, pending upon

the original bill against Messrs. Jones, Wheelock & Westlake, as levee commissioners. Mr. Palms, in 1880, by his attorneys, obtained leave of court to file an amended bill, or supplemental bill in the nature of a bill of review; but *he had lived after that leave was given six years, and filed* no amended bill or suplemental bill, or paper in the proceeding; and more than a year had elapsed after his death before these trust deeds were released, and, in the meantime, we are justified in saying that nearly all of the landowners supposed that the old suit against the commissioners had been abandoned, and would never be pressed again, and most of the present landowners inherited or purchased their land in the meantime, as many of the witnesses testified, without any knowledge of the pendency of this suit, and in the firm belief that the decision in the Webster case had absolutely defeated any recovery upon the bonds issued by the levee commissioners now involved in this suit.

We differ with counsel for appellants in his statement as to many of his assumptions of facts established, and in his conclusions, based upon assumptions of facts. He alleges that all of the defendants had actual notice of the various proceeding in the Pike County Court, and the acts of the old levee commissioners, and what the commissioners did with the bonds and proceeds of the sale of bonds sold by them. The evidence does not justify that assumption. As we understand it, the old levee law of 1871 did not require personal notice or service in any proceeding, it was only done by posting notices. No personal notice or service was required to be given the land owners as to

filing petitions for the Drainage or Levee Organization; no personal notice or service was required as to the empaneling of the jury, or as to when or how assessments would be made; no personal notice or service was required to notify them of what the assessment of the jury was. These notices, and all other notices to landowners, were to be made by posting notices in the drainage or levee district. They had no actual notice of this suit pending in the United States court, as they were not defendants at that time. Many of them never heard of it until they were served with summons, after filing the supplemental bill, bill of review, or bill of revivor, as it is variously called, in 1889.

The old commissioners could not have been acting for the landowners after the law was held void, in 1876, by the Supreme Court of the State of Illinois; the commissioners ceased to have any power or authority as commissioners after the decision in the Webster case was rendered in 1876; up to that time they had been using every effort to collect the assessments, made by the jury, with which to pay interest to the bondholders, but could, as officials, do nothing after that decision. When called into court on the original bill, they could only say what they did in their answer. They had no power; their hands were tied, the Supreme Court of the State had declared the law under which they had acted unconstitutional and of no effect, and that all of their acts and all preceedings in organizing the levee district were void; they had no means of collecting the assessments then made and no authority or means

of raising any funds or money from any source; no court could empower them to raise money to either pay interest on the bonds, or to pay bonds, or to even repair or improve the levee. Had they continued as officials of the old levee organization, they would only have held a naked office, with no duties to perform and no power to enforce the payment of any moneys for any purpose; hence, the assumption that they were acting for, and were the representatives of, the landowners, we think, is unwarranted by the evidence.

Counsel for appellants assumes, in his statement and argument, that all of the landowners, then and now, are liable for the construction of the old levee, on the ground, *first*, that the law of 1871 is constitutional and valid, and authorized the issue of bonds and the levying and collection of assessments, to pay the same, upon the lands in the levee district; *second*, that if the law is and was unconstitutional and the bonds issued declared invalid, that all lands in the district have been greatly benefited by the construction of the old levee, and that all present defendants are liable, or their lands in the district are liable, hence complainants have a remedy in equity. He wholly ignores the fact that, by the building of the old levee, and the various repairs, reconstruction and change of location and keeping of the levee up has been a great damage to most of the defendants in the lower end of the district, instead of a benefit, and claims that the complainants are subrogated to the rights of the contractors, each of which positions, we think, unsound.

ADDITIONAL STATEMENT OF FACTS.

I think best at this point to make a statement of the facts as to the additional defense, as to the lands and owners thereof in the lower end of the district, nearly one hundred of whom we represent in this case.

It is conceded by all parties that this levee district, as originally formed, or was attempted to be formed, under the law of 1871, is fifty two miles long along the east side of the Mississippi river, extending from Fall creek in Adams county, through Pike county, and to Hamburg in Calhoun county, and of a width of from three to five miles, excepting at the lower end, where it is about a quarter of a mile in width at the foot of the levee. As clearly shown from the evidence of Bramble, Prince, Chamberlain and many other witnesses, at the northern or upper end of this levee, opposite Hannibal, Missouri, the Sny, a stream from one hundred to three hundred feet in width, left the Mississippi river and extended through the levee district to Hamburg bay, at the lower end of the district, with numerous outlets from the Sny to the river opposite, where various large creeks from the uplands ran through the river bottom into the Sny; that there are seven to nine large creeks variously distributed from the north end of the levee to the extreme south end of the levee (Hamburg bay), carrying large bodies of water from the uplands, through these creeks into the Sny, and from there into the river, when there were rains or floods, without any great rise in the Mississippi river; that there is no outlet from this levee district, fifty-two miles long, excepting through the narrow

outlet at the lower end of the Sny, for all these large creeks; that there is no system of drainage to carry off the great bodies of water that flow down through these creeks into the bottom lands, in time of freshets and high water, but all remains upon the lands in the levee district or is forced through the small opening at the lower end of this district; that when the water is high in the river, and the levee now existing, or the original levee, keeps the water from the Mississippi river from overflowing these lands, the water backs up through the opening at the foot of the levee, and inundates and covers the land for about twelve to fifteen miles, in the lower end of the district north to the Chicago & Alton R. R., and a little above, and when the river is high enough for the levee to be any protection from overflow from the river, that the back-water above mentioned meets the flow of water from all of these large creeks, extending from the north end of the levee district, and, hence, it not only raises the water higher than it would be over the lands in the lower end of the district if no levee were there, but it causes this water to remain a great deal longer on these lands; that the lowest lands in the levee district are near the center of the bottom lands between the river and the bluffs; that many, if not all, of the lands in the lower end of the levee district, near what is called Bay creek, were worth from twenty-five to fifty dollars per acre before the old levee was built, which are now worth less than one-fourth what they were then, and that this depreciation in the value of these lands, and the injury to these lands for agricultural and sanitary purposes, have been occasioned by the build-

ing of the original levee from 1872 to 1874, and also the repairing, reconstructing and keeping up of this levee since that time; but the counsel for appellants wholly ignores this phase of the case in his statement and argument.

Other attorneys for the defendants—appellees—having most thoroughly and completely argued this case upon every phase presented, I shall argue the questions involved and our positions briefly.

We think there can be no recovery in this case by complainants, and base our argument upon the following premises:

First. The levee law of 1871 is and was unconstitutional, and all acts under it are void; the issuing of the bonds in this suit was without authority of law and they are void, because there was no law authorizing the commissioners to issue the bonds or create an indebtedness to construct the levee.

Second. The United States courts will follow the construction of the State Supreme Court, as to the Constitution and the statutes of the state, and follow the first decision rendered by the State courts upon its statutes or Constitution.

Third. If the bonds were valid, the complainants' remedy is at law, not in equity.

Fourth. The United States courts will not appoint any one either to assess or collect assessments of taxes, either at law or in equity, and, in this case, the registering of the bonds provided the method for collecting the assessments.

Fifth. The complainants can not claim the right to enforce any equitable rights the contractors might have had, if any.

Sixth. The interlocutory orders in the Circuit Court of the United States will not be binding upon any one, especially those defendants who were not parties at the time.

Seventh. The lands of the defendants in the lower part of the levee district comprise about one-sixth of the lands: which lands are not and never have been benefited by the levee, but have been greatly damaged and depreciated in value, and the landowners in that end of the levee district have, almost to a man, opposed the levee system from its inception, including the old levee organization and the present levee organization.

I.

I maintain that the bonds are invalid. The Constitution of the State of Illinois at the time of the passage of the Drainage Act of 1871, in Article 4, Section 31, of the Constitution, provided: "The general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others." It will be observed that, according to the wording of the above section, it provides for the construction of the drains and ditches only. No mention whatever is made of the building of a levee to protect the lands from inundation or overflow from rivers or other streams.

Section 5, Article 9, Const. 1870, provided: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

A State or Commonwealth is sovereign, but a county, city, town or village, or other municipal corporation, is not sovereign; it is a creature created by the law-making power of the sovereign, and has no rights, power or authority, excepting such as are conferred by the law-making power of the sovereign, the legislature. Such has been held to be the law by the courts of nearly all the States, and, frequently, by the Supreme Court of the State of Illinois.

The legislature, or general assembly of the State, have no right to make any law unauthorized by or in conflict with the Constitution of the State. The Constitution of 1870, of the State of Illinois, empowered the legislature of the State to pass laws authorizing or permitting "the owners or occupants of lands *to construct drains and ditches for agricultural purposes, across the lands of others.*" (See Const. 1870, Art. 4, Sec. 31.) The legislature, or general assembly of the State of Illinois, in 1871, attempted to pass an act authorized by this section of the Constitution.

The first section of that Drainage Act is as follows: "Be it enacted by the people of the State of Illinois, represented in the General Assembly: That whenever one or more owners or occupants of land shall desire to construct a drain or drains, ditch or ditches, across the lands of others, for agricultural or sanitary purposes, such person or persons may file a petition in the County Court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route and terminus, *and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same, as proposed*, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter."

It is apparent the legislature attempted to comply with the above-mentioned section of the Constitution in passing the Drainage Act of 1871, but the Constitution nowhere provides for building a levee, or other work to protect lands from overflow or inundation, but to construct drains and ditches only; yet the legislature seems to have had in mind that in order to construct the drains and ditches for agricultural or sanitary purposes, it might become necessary to erect a levee to assist in the drainage of lands.

The original petition, filed in County Court of Pike County, for the organization of the claimed levee district,

in this suit, represents "that they (petitioners) desire to construct drains and ditches, *and also a levee*, and other work across the lands of others in said bottom lands for agricultural and sanitary purposes, and that they desire to construct the same upon and along said bottom lands so as to *reclaim said bottom lands from overflow by the waters of the said river*, in order to make the location salubrious and render the soil fertile for tillage, and otherwise develop the agricultural resources of the said bottom lands; and further say that it is necessary that said drains, ditches, *levee* and other work should be constructed." (See Record p. 442.)

It will be seen from that, this petition prayed for an organization with greater powers and rights than were conferred by the act of the legislature of 1871, as that act only authorized the construction of a levee to aid and carry out the object intended by constructing drains and ditches; but this petition, while it speaks of drains and ditches, expressly shows upon its face that the primary, in fact, sole object of this drainage organization prayed for, was for the purpose of constructing a levee fifty odd miles in lenght, to prevent the overflow from the river. The legislature, in the passage of the drainage act of 1871, exceeded the power given in the Constitution by authorizing a levee, but the petition in this case, and all proceedings in this case went far beyond the power conferred by the legislature; the legislature attempted to empower a drainage commission to construct ditches and drains for agricultural and sanitary purposes, and, if necessary to carry out that purpose, to construct a

levee. But this petition and all proceedings under it was not for the purpose of constructing drains and ditches for agricultural and sanitary purposes, *but was for the purpose of building a levee to protect the lands from overflow and "to make the location salubrious and render the soil fertile for tillage, and otherwise develop the agricultural resources of said bottom lands."* From the above it seems to us clear to the mind of any one that this drainage district, as organized, was not authorized by either the Constitution or the act of the legislature.

We need not have any difficulty upon that question, however, for this has been fully settled and determined by the Supreme Court of the State of Illinois in the case of *Webster* v. *The People*, decided in 1876, not reported in full, wherein the court say: "The principal questions raised and discussed in this case are the same as in *Updike* v. *Wright*, decided at the present term, and for an expression of our views, reference is made to the opinion in that case. For the reason there given, the judgment in this case will be reversed and the cause remanded." (See Record p. 459.) This case of *Webster* v. *The People* grew out of the resistance and opposition of Webster to the collection of the assessments made in the so-called drainage district, the commissioners of which issued the bonds mentioned in the bill of complaint in this case. It is the same levee district and the same assessments upon lands described in *Exhibit A*, in the record in this case, and the county collector, the auditor having certified the same to him, was attempting to

collect assessments to pay the interest on the bonds mentioned in the suit at bar; and in that case, by adopting the decision in the case of *Updike* v. *Wright*, 81 Ill. p. 49, the Supreme Court of the State of Illinois held the drainage act under which this old drainage district was organized, unconstitutional and void, and that the bonds issued by the commissioners of this drainage district were void absolutely; that they had been issued without authority of law and were no liens upon the lands, and could not be collected or enforced. In the case of *Updike* v. *Wright*, *supra*, on pp. 51–52, the court, referring to the drainage act of 1871, say: "This statute was evidently passed in view of that clause of the Constitution which declares 'the general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others.' Art. 4, Sec. 31, Const. 1870. Apparently an effort was made to have the law enacted to conform to the constitutional provisions in every particular. Hence, it is declared, the work to be done is to construct drains and ditches for agricultural and sanitary purposes, and, if it becomes necessary in the construction of a system of drainage that 'levee or other work' be adopted to make that system available, such levee or other work may be constructed under the provisions of the statute. But it is nowhere intimated, the owners or occupants may undertake under the provisions of this law, the building and maintenance of an immense levee on the borders of a river not connected with any system of drainage by ditches. Neither

the Constitution nor the statute contemplates any such work. What was in the minds of the framers of the Constitution, and the legislature who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of 'levee or other work,' is always in connection with a system of drainage in that mode. The work outlined by the Constitution and the statute is comparatively insignificant and may be done at no great cost; but that which is undertaken in this case is the construction of a levee on the banks of the Wabash (Mississippi) river; that their fences and crops are liable to be swept away and destroyed by an overflow and that the same can be prevented by an earthwork levee. * * * Any construction of the statute that would warrant the owners or occupants of the land to enter upon such an immense and costly work, seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes 'levee or other works' may be undertaken as auxiliary to the drainage of lands. Our opinion is, this is the only construction the statute will bear, consistent with the Constitution; otherwise, one owner whose lands are subject to overflow at certain seasons of the year, from a river, could set in motion the proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of others in the vicinity, which commissioners appointed by the court might deem benefited by the improvement. Such a work can not be said to be draining lands by drains and ditches over the

lands of others; nor is such a levee in any just sense, in the language of the statute, 'necessary to the drainage of the lands.' The work of constructing a great levee along the banks of a river subject to overflow, which defendants are about to do, is not embraced within the provisions of the statute, and is, therefore, without authority of enabling law."

The above is not the mere dictum of the court; it is the decision of the court and the reasoning for the decision that the drainage organization was about to build and construct a levee along the Wabash, and also a levee along the Mississippi river, which was unauthorized, either by the Constitution or act of the general assembly of the State of Illinois. The above decision is not simply a case analogous or parallel to the one at issue, *but it is the same case that is at issue here*; and the highest court of the State has said in the above cases that it was not authorized by either the Constitution or the statute. But the court continued, on pages 52 and 53: "But the decision may be placed on the other ground indicated, that the general assembly possesses no power under the Constitution to vest the commissioners or juries selected, or the County Court, with authority to assess and collect taxes, or special assessments, for the contemplated improvements."

"Section 5, Article 9, of the Constitution of 1848, which declared 'the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the

same,' was always construed, by the decisions of this court, as a limitation upon the power of the general assembly to grant the right to assess and collect taxes to any other than the corporate or local authorities of the municipalities or districts to be taxed. *Board of Directors* v. *Houston*, 71 Ill. 318; *Harward* v. *The St. Clair and Monroe Levee and Drainage Co.*, 51 Ill. 130; *South Park Commissioners* v. *Solomon*, 51 Ill. 37; *Gage* v. *Graham*, 57 Ill. 144; *Hessler* v. *Drainage Commissioners*, 53 Ill. 105. It was also held that power in the legislature was subject to the further limitation that a local burden, or taxation or special assessments, could not be imposed upon a locality without the consent of the tax-payers to be affected."

"That section of the Constitution of 1870, upon this subject, provides, 'the general assembly may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessments or by special taxation on contiguous property, or otherwise.' For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

"The clause in the present Constitution, like that in the Constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns and villages with power to make local improvements by special assessments, or special taxation upon contiguous

property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns and villages are within the constitutional provisions, and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same."

The court continue reasoning and illustrating, and upon page 56, say, in regard to the levee organization and the right to issue bonds for the construction of levees, "In the case at bar, this immense work (which, if completed on the plan proposed will subject all the property in the vicinity that, in the judgment of the commissioners or juries selected, may be benefited, to a heavy and burdensome taxation), was commenced under the decision of the court as to its property, and not upon any election of the people upon whom the burden will fall. If this act could be held to authorize the imposition of such burdens in the mode the assessments were made in this case, it would be in contravention with the Constitution as well as with the plainest principles of right and justice."

The *Updike* v. *Wright* case, from which the above quotation was taken, was a bill to enjoin the collection of the said assessments made by that levee organization under the laws of 1871. The Circuit Court granted the injunction, and the Supreme Court affirmed the decision of the lower courts. The case of *Webster* v. *The People*, *supra*,

was an objection to judgment being rendered under the revenue act of Illinois, asking judgment against his lands for the collection of the assessment made by the jury empaneled by the court in proceedings for the organization of the levee drainage district, mentioned in this case, the commissioners of which issued the bonds involved in this suit. And although *Updike* v. *Wright* was a suit in equity, the same questions arose as to the validity of the bonds, and the court was called upon to construe the act of the legislature and the proceedings to organize each of the said districts; and in each case the court held the drainage organization was without authority of the Constitution or the statute of the State, and that all acts creating indebtedness or the issuing of bonds were absolutely void and without effect.

Counsel for appellants, in his argument, quotes from the case of *Blake* v. *The People*, 109 Ill. 504, to sustain his position that these bonds are valid. We were the unfortunate counsel for the appellent Blake in that case, and it was a case where the counsel were handicapped because Blake never had actual notice of the organization of a levee district in 1880, embracing the same lands involved in the old levee district, nor of assessment by a jury under that organization against his land, and did not file objections to such assessments; but when, through the process of collecting the assessments, the county collector asked for judgment against the lands of Blake, he appeared and contested upon various grounds, among others, that this levee organization was not formed to repair, rebuild and construct a levee under

any former law of the State of Illinois; and in that case the court held, not that it was a valid levee organization under the law of 1871, which constructed this levee, not that the proceedings take in the County Court to build and construct this levee was authorized by the law, nor that the levee commissioners had power to issue bonds to build and construct the levee. They simply held, incidentally, that the old levee, taken possession of by the new organization, might have been constructed under the former law, although the former law was invalid, as to certain powers conferred upon the drainage organization and the commissioners thereof, and that the defendant, Blake, never appeared to contest the petition for the organization of the Sny Island Levee Drainage District, organized in 1880, nor to contest the assessments made by the jury, and that thereby he had lost whatever rights he may have had in that regard, and that it was too late to question those proceedings upon an application for judgment against the land for taxes or assessments. In that case, we are compelled to admit that we were wrong, that the Supreme Court of the State of Illinois say so, and what they say is law, and we must also say so, notwithstanding we may think it is not good law. But a careful consideration of that case clearly shows that the court not only did not decide any question as to the validity of the old levee district organization in 1871, nor the validity of any contracts made, indebtednesses incurred, nor bonds issued, but the reasoning or dictum of the court in that case do not indicate or intimate that there was a valid or-

ganization under the act of 1871 of this old levee district, nor that the commissioners had power to make contracts, create indebtedness, nor issue bonds; but in the cases of *Webster* v. *The People* and *Updike* v. *Wright*, the Supreme Court of the State of Illinois do hold that this old levee organization, for the purpose of constructing the levee, creating indebtedness and issuing bonds, was without authority of the law, and was not authorized either by the Constitution or by the drainage act passed by the legislature in 1871; that the bonds issued and the assessments made are void.

From the above we think it is plain that the bonds involved in this litigation are absolutely void and can not be collected or enforced against any of the defendants in this case, either in a court of law or a court of equity.

II.

Counsel for appellants says that notwithstanding the Supreme Court has held the bonds involved in this case were issued without authority of law and are void, the Federal court should ignore the decision of the State Supreme Court, and render a decision in accordance with the view taken by him, regardless of the holdings of such Supreme Court. We respectfully differ with him. We think that the cases cited in appellant's brief are not applicable to the case at bar.

The case of *Town of Elwood* v. *Marcy*, 92 U. S. Rep. 289, construes the statute of the State of Illinois in a chancery suit concerning municipal bonds, and the court say, on

page 294: "We are not called upon to vindicate the decision of the Supreme Court of the State of Illinois in these cases, or approve the reasoning by which it reaches its conclusion. If the questions before us had never been passed upon by it, some of my bretheren who aggree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void because the laws which authorized their issue were in violation of a peculiar provision of the Contsitution of Illinois. We have always followed the highest court of the State in its construction of its own Constitution and laws. It is only where they have been construed differently at different times that, in cases like this, we have adopted as a rule of action, the first decision, and rejected the last. This has been done on the grounds that the rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the courts; but, where the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue.

"There has been no conflict of judicial opinion in Illinois upon the controlling question in this suit, but, on the contrary, a settled uniformity. As these concurring decisions of the court of last resort in that State are grounded on the construction of its Constitution and statutes, it is the duty of this court to conform to them."

In the case at bar, the Supreme Court of the State of Illinois, in *Updike* v. *Wright* and *Webster* v. *The People*, have construed the Constitution and the statute as to drainage organiziation, and have expressly held that this drainage organization was not authorized by either the Constitution of the State nor the statute of the State, and that the commissioners had no power or authority whatsoever to issue the bonds involved in this suit nor to have assessments made against the land and collected for the payment of any bonds or interest. There is no decision in any case by the Supreme Court of the State of Illinois that modifies, changes or overrules the decisions in these two cases, consequently we apprehend the court will hold in conformity with the decision of the Supreme court of Illinois in construing the Constitution and statutes; that the bonds involved in this suit were issued by the commissioners without authority of law, and are absolutely void.

The court, in the case of *The Town of South Ottawa* v. *Perkins*, (Ill.) 94 U. S. 260, held the law to be the same as in the above cases.

As the counsel for appellants stated his position in the Court of Appeals, I assume that he will also take the same position here in his argument as in the Court of Appeals. On page 71 of appellant's brief, counsel says: "I am advised by my associate, General Palmer, that Judge Drummond was decidedly of the opinion that the decision of the State court of Illinois was not binding upon him, and that the drainage act was valid and that the assessments thereunder, if regular-

ly made in conformity with its provisions, were subsisting liens upon the lands assessed; certainly under no other view of the law could we have rendered the decree of March 13, 1879, and July 7, 1880. All questions concerning the validity, in general, of these assessments were settled and conclusively determined in complainants' favor by those decrees. The court preserved the right of the individual defendants to show, if they were able, why their particular lands should be excepted from the general rule. To this end and for this purpose only, was any supplemental bill provided for in the decree." We do not understand the law to be as insisted upon by counsel for appellants. My understanding of the law is that, interlocutory decrees are not binding. They are not final and can not be appealed from, and may be changed, modified or annulled by the court at any time before final determination of the case. The court will observe that, in the interlocutory order mentioned by counsel (see Record, pp. 439-440), there was simply a decree as to the amount due upon the bonds to the complainant and others, and that "the above amounts are found due, *without prejudice*, and further that the sum of money so found to be due are a lien upon the assessments made under the order of the County Court of Pike County upon the lands described in bound book Exhibit A." The court simply decreed what amount was due upon the bonds and that the bonds were a lien upon the assessments, and that the amounts found due were *without prejudice*. At that time, there were only three defendants, Messrs. Jones, Wheelock and Westlake, who were commissioners when the levee was constructed. None of these defendants were parties to this

suit, and were not brought into this suit until nearly nine years afterwards, and counsel says "to this end and for this purpose only, was any supplemental bill provided for in the decree." If this is true, Mr. Palms, knowing that this levee had broken, and in many places great sections of the levee had washed out, and that the lands then were in as bad or worse condition than before the levee was built, why did he remain silent and file no supplemental bill, while there was an amendment to the Constitution of the State being voted upon in 1879, and a new drainage act passed by the legislature of Illinois in 1879, conforming to the amendment to the Constitution, and a new levee and drainage organization formed under such law, and that it took possession of this levee in 1880; that hundreds of thousands of dollars was raised by such new organization, by assessment upon the lands, with which to rebuild, reconstruct and repair this old levee bed? This leave was given to file this amended or supplemental bill to bring these defendants in 1880; Mr. Palms lived until 1886, more than six years after leave was given to file this supplemental bill, but never filed the same, nor did his executors until 1889. In the meantime, the then landowners, knowing of the decision in the case of *Webster* v. *The People*, in regard to the old levee, and no further steps being taken in this case, supposed the whole matter had been settled by the courts, and they were selling lands to others, who, if they knew anything about it, learned the same facts; many of them died, leaving children to inherit their lands, with the same understanding, and, after waiting all these years and finding that the new levee organization, by persistent effort;

the expenditure of hundreds of thousands of dollars raised by assessments upon the lands; fifty thousand dollars from the government of the United States, the location of the levee changed in many places, gaps were rebuilt and refilled, the levy repaired and built several feet higher than it had ever been before. And after Mr. Palms, remaining quiet during all these years of his lifetime, and the landowners believing, as I have stated. After Mr. Palms' death, the executors filed their supplemental bill or bills, in the nature of a bill of review or revivor, and bring these defendants into court, the great majority of them having obtained their land since 1880, and that a lien be enforced against the lands to pay the bonds which had been declared invalid and issued without authority of the law by the Supreme Court of the State.

III.

If the bonds are valid or could be collected, appellants have no standing in a court of equity, as we understand the law, but would be compelled to resort to a court of law. Their bonds were registered with the auditor of the State of Illinois, and each year it became his duty, before the time of settlement of the county collectors of State taxes, to make out and forward to the several county collectors of the counties in which the assessed lands may be situated, a statement of the amount of the assessment collectible in that year, that may be required to pay the interest upon such bonds in that year, and insure the payment of the principal of said bonds out of such assessment, and the county collector should collect the same and pay into the State treasury to the credit of the com-

missioners, which shall be held and paid out by such treasury, as provided (Record pp. 405-406). If the bonds can be collected, what was there to prevent complainants from recovering a judgment in a State court or Federal court, and then if the officers refuse to do their duty, the court would, by mandamus compel the auditor to certify the assessment and the collector to collect the same and pay to the State treasury, and the State treasury to pay the judgment or judgments. If the bonds are valid, that could be done, and a court of equity, as I understand the law, would have no jurisdiction of the cause.

IV.

The bill and amended bills in this case, pray that the court may declare the bonds a lien upon the assessments; that the court will determine the amounts due upon the bonds, and the amounts due on the several assessments made against and upon each tract of land described in the pleadings and exhibits; and the proposed amounts of such assessments upon each tract of land necessary to pay the amount of the principal and interest now due upon the bonds and coupons of the complainants and others; * * * and that each of said tracts of land be sold under the order and decree of this court for the amount chargeable upon and against the same, unless the owner or some other person shall, within a day limited, pay such amount, with a just proportion of the cost of this suit, and further prays for the appointment of another commissioner, or of a receiver. (Record pp. 45-46).

I believe there is no allegation in the bill that the auditor has failed or refused to comply with the duties devolving upon him, or the county collector to perform the duties devolving upon him. The commissioners had nothing to do with certifying or collecting these assessments. They had not refused to perform any duties devolving upon them. Although not required by the drainage act, or law, after these bonds were registered to do anything to enforce the collection of the assessments, the commissioners did employ eminent counsel, and use every effort and means to aid the county collector to enforce the collection of these assessments in the mode provided by the statute; and after the decision in the case of *Webster* v. *The People*, used every endeavor to obtain a rehearing in the State Supreme Court, but failed.

If the bonds were valid, or collectible, there was a complete mode provided for the collection of the assessments. There were officers in office who should do this work; they were ready and willing to do it; but the law authorizing the construction of the levee and the issuing of bonds had been held unconstitutional and void, and that the whole proceedings, in organizing the district and issuing the bonds was in violation of the Constitution, and the statute, by the Supreme Court of the State, and these officers could do nothing. Consequently the bondholders came into the Federal court and asked the court to ignore the decision of the State Supreme Court, and appoint some one to collect the assessments or to take an accounting

and find what each landowner should pay, or each tract of land should be assessed, and collect the same and pay the bonds and coupons.

Counsel for appellants says, in effect, the decision of the Supreme Court of Illinois in the case of *Updike* v. *Wright* and *Webster* v. *The People*, has declared the old drainage organization, and all proceedings under it, void and of no effect; that the commissioners had no authority or power to construct the levee and create an indebtedness for its construction, or to issue bonds to pay for its construction, or to issue and sell bonds to obtain funds to pay for its construction; hence, they must come into the Federal court on the equity side, and ask the Federal court to enforce the collection of the assessments, and appoint some person to do so, and to ascertain how much each tract of land was benefited by the construction of the old levee, and what each tract of land should be assessed to pay the bonds (void bonds), and collect such assessment and pay the bonds and pay the interest. If this is not the position of the counsel for appellants, why should not complainants be relegated to the State courts to compel the collection of the assessments and payment of money in the mode prescribed?

This brings us to the question: Will the Federal courts appoint a person to make or levee an assessment or tax, or to collect the tax, as asked in the supplemental bill in this case? I understand the law to be that the courts will not do so. This question is not a new one in the

United States courts. It has been fully settled by the Supreme Court of the United States in many cases, some of which are as follows:

Thompson v. *Allen County* (Ky.), 115 U. S. Rep. 550.

Norton v. *Shelley County* (Tenn.), 118 U. S. Rep. 425.

Rees v. *Watertown* (Wis.), 86 U. S. Rep. 107.

Barkley v. *Levee Commissioners* (La.), 93 U. S. Rep. 258.

Heine v. *Levee Commissioners* (La.). 19 Wall. 86, U. S. Rep. 655.

Marsh v. *Supervisors* (Ill.), 77 U. S. Rep. 676.

The case of *Thompson* v. *Allen County, supra*, contains a thorough and extensive discussion of the question, and the court analyzes and discusses many of the former decisions of the court on that question, and, although there was a dissenting opinion by one of the eminent jurists, his dissenting opinion was based upon the ground that the debt was valid, so held by the State court, a judgment was rendered, execution had issued, and was returned "no property found." The officers had been compelled by mandamus of the State Circuit Court to levy the tax; the tax had been levied and was ready to be collected, but no person would qualify as collector to collect the tax; hence, the court should appoint some one to col- the tax. The majority of the court held, however, in that case, that the Federal court had no power to appoint a person to collect the taxes, even under those circumstances. The court cites some of the cases above referred to, and

others of the United States Supreme Court holding the same way. Yet counsel for appellants insists that the Federal court should empower or authorize some person appointed by the court to collect assessments, held uncollectible by the Supreme Court of Illinois, or to appoint some one to equalize and levy and collect assessments, against the various tracts of land in the levy district, to pay the bonds of the complainants. As we understand the law, this will not be done by the court.

The case of *Thompson* v. *Allen County*, *supra*, was a bill in chancery, filed in the Circuit Court of the United States for the District of Kentucky, to enforce the collection of a tax to pay two judgments at law, on coupon bonds, and issued by the county to pay subscriptions of stock of the Cumberland & Ohio Railroad Company, and as no one would qualify to collect the tax, the aid of a federal court on the equity side was appealed to. The difference in that case and the case at bar is, there the bonds were valid, so held by the State court, and the tax had been levied; all that was needed was for some one to collect the tax. The court refused the aid asked, and held that it had no power to appoint any one to collect the tax, but that the complainants must look to the legislature of the State, if the State courts had not the power to enforce the collection. After reviewing the facts and authorities cited on pages 559 and 560, the court say: "The difficulty is that no power exists in either court, to fill the vacancy in the office of tax collector; and the case of *Lee County Supervisors* v. *Rogers*, 7 Wall. 175, where the

laws of the State of Iowa expressly authorized the court to enforce its writ of mandamus by making such appointment, the only case in which it had ever been done, shows that without such legislative authority it can not be done.

"It is the duty of the marshals of the Federal courts and the sheriff of the State courts to levy executions issuing from these courts on the property of defendants, and sell it, to raise money to pay their judgments. Let us suppose that, for some reason or other, the office of marshal or sheriff became vacant for awhile Would that authorize the court of equity of the Federal or state government to appoint a sheriff or marshal? or to appoint a receiver to levy the execution? or, if it had been levied, to sell the property, collect the purchase money, and pay it to the plaintiff? If this can not be done, if it never has been done, why can it do a much more unjudicial act, by appointing a collector to collect the taxes, or, *what is still less appropriate, appointing a receiver, and endow him with that power?*

"To appoint a marshal or sheriff to execute the process of a court, to enforce the judgment of that court, is not such a wide departure from the judicial function as to appoint a receiver to collect taxes; but no case has been cited of the exercise of even the former power by the court, much less the appointment by a court of chancery, of an officer to execute the process of a court of law. The appointment of special masters or commissioners to make sales under decrees in chancery, is the ordinary mode of that court to enforce its decrees in cases where the court has jurisdiction of the subject-matter of the suit.

"Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the State of Kentucky are equally emphatic. It is the powers derived from the statute law of that State, under which alone, this tax can be collected. The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax.

"It enacted that its collection should not be by the sheriff who collected the ordinary taxes for the State and county, but that a special tax collector should be appointed for that purpose by the justices of the County Court who levied the tax. The Court of Appeals, construing this statute, which was in existence when the bonds were issued, holds that no officers but these can collect the taxes, and has decided, both in reference to this law and the Constitution of the State, that a court of chancery can not appoint such an officer or exercise this function of tax collector. *McLean County Precinct* v. *Deposit Bank*, 81 Ky. 254."

There is no decision of the Supreme Court of the State of Illinois that holds different from the above, that I know of. Therefore, as I understand the law, the Federal court will not appoint any one to either levy and equalize the assessment on the lands of the defendants or any of them, or to collect the same, or to even appoint a person to collect the assessments levied under the old drainage organization, by the jury, even if the bonds were valid and the assessments equitable.

V.

The Supreme Court of Illinois having held that the old levee organization was without authority of law, and that the commissioners had no power or authority to create an indebtedness to construct or build the levee, or to issue bonds to construct or build the levee, or to issue and sell bonds to procure funds to construct and build the levee, that all assessments under the proceedings in the Pike County Court were void, and could not be collected, complainants come into the Federal court and file a bill for relief, and after alleging the various steps and proceedings from since long before the passage of the drainage act of 1871, by the legislature of Illinois, to the filing of the supplemental bill, bill of review, or bill of revivor, variously called, and the amendments thereto, allege that Mr. Palms, relying upon certain facts, purchased bonds of the levee commissioners and that the levee commissioners, with the full knowledge of all of the then landowners, out of the moneys advanced by said Palms, and other purchasers of said bonds, constructed said levee with such moneys.

Upon this allegation the evidence was all taken, and showed without question that Mr. Palms never bought a bond of any of the levee commissioners nor advanced a cent of money, but that after said levee had been constructed, he bought the bonds of Heffron and others, bondsmen of Skelsey, Fuller and Pierce, the contractors to whom the bonds had been delivered in payment for the construction of the levee. Having failed to prove that allegation, when the case was called for trial November 5, 1895, by leave of court, that allegation was eliminated from the bill by

the amendment, "*the bonds were bought of the contractors*," and the cause was tried upon the bill as so amended, the answer and the evidence taken.

Counsel for appellants, as I understand his argument, does not directly insist upon the complainants being subrogated to the rights of the contractors or their bondsmen to whom the bonds were delivered in payment for the levee they had built and constructed; but with admirable zeal and ingenuity, counsel assumes that if the law under which the bonds were issued was unconstitutional, and that the commissioners had no power to issue the bonds, that the defendants are estopped from setting up such unconstitutionality as a defense; and counsel's argument on the question of estoppel is based upon the assumption that the present bondholders are in the same condition as the contractors would be if they were the complainants in this cause; or that the commissioners and the landowners induced the present owners of the bonds or their testator to purchase them and advanced the money to the commissioners with which to construct the levee, and that, therefore, having received the money from the purchasers of the bonds, and having stood by and permitted the commissioners to build and construct the levee with the money advanced by Mr. Palms, with their knowledge, they should in equity, pay the bonds, or all the lands embodied in the levee district should contribute to the payment of the bonds.

As I understand the law, the complainants can not, in this case, invoke the doctrine of subrogation; that is, they

can not claim that the contractors or their bondsmen, who took the bonds in payment for building and constructing the levee, by reason thereof would have an equitable lien on either the land or lands in the district, if they were the complainants here, and, therefore, Mr. M. Palms having bought the bonds of such contractors or their bondsmen, complainants have the same rights or equities that the contractors or their bondsmen would who did the work and took the bonds in payment therefor, were they the complainants. As has been stated heretofore, neither the commissioners, nor any of the then landowners asked Mr. Palms to buy bonds of them or to furnish money with which to construct the levee, or to aid in its construction. The contractors and their bondsmen had constructed the levee as it was left, and took in payment for the same, these bonds in suit. No representations, false, fraudulent, or otherwise, were made by any of them to induce Mr. Palms or any other purchasers to buy these bonds, as shown from the evidence; but when the bonds were offered for sale by Mr. Heffron, one of the bondsmen for the contractors, Mr. Palms, sent his attorneys to Pike County, to examine and investigate all of the proceedings in relation to the act authorizing the organization of the levee district, the appointment of commissioners, the assessments by the jury and the issue and registration of the bonds; and, upon the opinion of his attorneys as to the validity of the bonds, which opinions are in the record in this case on pages 454–458, he purchased the bonds, for none of which he paid to exceed ninety cents on the dollar. He bought the bonds upon the market upon the advice of his

attorneys that they were valid, and not as alleged, in the bill, that he was induced to buy them by representations of the commissioners or any of the landowners. There is no evidence whatever to sustain that allegation; he bought them on the market on speculation, and this case is directly in line with the case of

Ætna Life Insurance Co. v. *Middleport*, 124 U.S. Rep. 534, in which case there was a thorough discussion of the doctrine of subrogation in all its branches, and a review of the former decisions upon that question. In that case the town of Middleport was authorized by law to vote a subscription to induce the building of the C., D. & V. Railroad, and to levy taxes and collect the same to pay such subscription. The subscription was voted to the amount of $15,000; the road was built and the money due, but no money on hand with which to pay it; the officers issued bonds for the amount and delivered the same to the railroad company in payment of such subscription; the railroad company offered the bonds for sale upon the market, the same as was done by the contractors or their bondsmen in this case, and the Ætna Life Insurance Company purchased the bonds, the same as Palms did of the contractors or their bondsmen in this case, that had been delivered in payment for the work done in constructing the levee.

The State court held that the bonds were void, issued without authority of law, and that no tax or assessment could be levied or collected with which to pay the same. The Ætna Life Insurance Company then filed a bill in the United States Court for the Northern District of Illinois,

claiming that it was or should be subrogated to the rights of the railroad company, and hence, as the town was authorized to vote the subscription and collect the tax to pay it, and as the railroad company on the strength and credit thereof had built the road, and that, although the bonds were void, the town of Middleport, having obtained the railroad and all the benefits to be derived from the railroad, had such rights that a court of equity would enforce, and insisted that it, having purchased the bonds from this railroad company, should have the same equities that the railroad company had. The court held that it had no rights which it could enforce; that the law of subrogation could not be applied to that case; and after a full discussion and review of the cases of

Otis et al. v. *Cullem*, Recv., 92 U. S. Rep. 447;
Lambert v. *Heath*, 15 Meeson & Welsby, 486;
Litchfield v. *Ballew*, 114 U. S. Rep. 190,

on pages 547–549, the court say: "One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that being forced, under such circumstances, to pay off the debt of creditors who had some superior lien or right to his own, he could for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff

in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.

"But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Ætna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company.

"These propositions are very clearly stated in a useful monograph on the Law of Subrogation, by Henry N. Sheldon, and are well established by authorities which he cites. The doctrine of subrogation is derived from the civil law, and 'it is said to be a legal fiction, by force of which an obligation, extinguished by a payment made by a third per-

son, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another. * * *. It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges of mortgages, being obligated to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another.

Sheldon on Subrogation, Secs. 2, 3.

"In section 240, it is said: 'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own.'

"This is sustained by a reference to the case of

Shinn v. *Budd*, 14 N. J. Eq. (1 McCarter) 234.

Sanford v. *McLean*, 3 Paige, 117.

Hoover v. *Epler*, 52 Senn. St. 522."

And also on page 551, the court further say: "The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the code of that State is in the main founded on the civil law from which the right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the Appellate Court of the State of Illinois, *Suppiger* v. *Garrels*, 20 Bradwell App. Ill. 625, the substance of which is thus stated in the syllabus:

"'Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, if he pays the debt, a mere volunteer.'

"No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find any thing contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's endorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action."

The above case is exactly like the case at bar. It was a case where the bonds were held to be void; the purchas-

ers of the bonds filed a bill in a court of equity to enforce a lien for the benefits derived from the construction of the railroad, for which and to which these bonds were delivered, and the court denied their right to any aid or relief whatever. The only difference in the two cases is in favor of the case at bar. In that case the town was authorized to vote the subscription and levy and collect a tax to pay it; in the case at bar, as held by the State Supreme Court in *Webster* v. *The People*, the levee organization was not authorized to construct the levee, nor to issue bonds therefor, nor to levy or have levied assessments with which to pay the same, but all acts done were in direct violation of the Constitution and the statute.

Other counsel for other appellees have thoroughly and ably discussed the question of estoppel in all of its branches, and I will add but briefly to them.

Bigelow on Estoppel, 5th Ed. 557-558, states the law to be:

"In order to justify the interposition of equity in the case mentioned it is necessary to establish, not only the fact of misrepresentation or concealment, but also that it has been in a matter of substance or of importance to the interests of the other party, and that it has actually misled him. If the misrepresentation was of a trifling or immaterial thing, or if the party alleging it did not in fact trust in it or was not misled by it or if it was vague or inconclusive in its nature, *or if it was a matter of opinion of fact equally open to the knowledge of both parties, in regard to which neither could be presumed to trust the other;* in these and the

like cases equity will not grant relief. We shall see in the course of the present chapter that the legal doctrine of estoppel by conduct is founded upon similar considerations. We now call attention to a few of the leading cases in which the general nature of this particular phase of estoppel by conduct is defined; and we shall then pass on to a de tailed examination on the subject," citing, among other cases,

Drexel v. *Berney*, 132 U. S. Rep. 241.

in which case the court say: "It is held that to justify resort to equity, in respect of this 'equitable estoppel,' it is necessary that there should be some ground of equity apart from the estoppel itself; in other words, this estoppel in itself is purely legal. *There cannot be any estoppel, according to some cases, against showing an act made void by statute.*"

Story's Equity Jurisprudence, 13th Ed., Section 1544, states the following rule: "This doctrine of estoppel *in pais* in ordinary cases grows out of a fraudulent purpose and a fraudulent result. If indeed the element of deception is wanting, there is no estoppel, as, if both parties were equally cognizant of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acting solely upon his own judgment. There must be deception and change of conduct in consequence, in order to estop the party from showing the truth."

It is apparent from the evidence in this case that the commissioners and all parties who took part in the pro-

ceedings to organize the levee corporation; to levy assessments; to construct the levee; and to issue the bonds, as well as Mr. Palms and his attorneys, and other purchasers of the bonds, were mistaken as to the law and as to the validity of the bonds; but who was at fault? The landowners, who wanted the levee, supposed that they would have the benefit and protection of the law in building and constructing and keeping the levee in repair, and that their lands would be greatly enhanced in value and benefited; Mr. Palms purchasing the bonds, and his attorneys, supposed that the bonds were valid and could be collected in the mode and method provided by law; but they were mistaken; Mr. Palms lost the money he paid for the bonds; the levee proved to be no protection to the lands; the law was proved to be invalid by the Supreme Court of the State of Illinois; they had no means to raise money with which to keep the levee in repair; there was no law they could invoke to aid them in doing so. They, believing the law to be valid and that money could be raised under it to keep up and maintain the levee, expended hundreds of tnousand of dollars in putting the lands in cultivation, opening them up, and building houses, fences and other improvements thereon; but by the time of the rendering of the decision in the case of *Updike* v. *Wright* and *Webster* v. *The People*, the levee broke in many places and washed away all of their improvements and the lands were of no more value than before any levee was built and commenced. All were mistaken and all lost their money; and under the above authorities, how could the complainants enforce the collection of

void bonds, against the lands in this levee district? Was Mr. Palms mislead by anything done or said by the commissioners or the landowners that induced him to buy the bonds? No, there is no evidence tending to show that fact. He was advised by his attorneys that the bonds were valid, and upon that he purchased them. He and complainants are in the same condition as many other persons buying void bonds upon the market. The case also of

Lambert v. *Heath*, 15 Meeson & Welsby, 486,

is applicable here. The court say in that case, "Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they can not have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to see, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he can not occupy the vantage ground upon which it would have placed him." P. 449.

If counsel for appellants takes the position that they should have a lien upon the levy itself, the case of

Litchfield v. *Ballou*, 114 U. S. Rep. 190,

is applicable. In that case, the city of Litchfield had issued bonds to construct water works, and issued them beyond the limit provided by statute; the court denied the lien of the complainants upon the water works, and one of the grounds upon which the lien was denied was that other money than that of complainants had helped to build the water works. In the case at bar, about three miles of this levee was built and is being maintained by the Wabash Railroad, the C., B. & Q. Railroad, and the Chicago & Alton Railroad; the land owners under the trust deeds mentioned in this case expended thousands of dollars in trying to repair this levee; the new levee organization has expended hundreds of thousands of dollars in changing the location of the levee, raising the levee higher, and wholly rebuilding the levee in many places; also the government of the United States appropriated and expended $50,000 in obtaining a location for a portion of this same levee, building it and making improvements upon it. Applying the doctrine of *Litchfield* v. *Ballou* above, complainants could have no lien upon the levee. The earthwork was constructed partly with the money of others, and of the government.

VI.

I have briefly mentioned the question of the interlocutory order heretofore. How can this interlocutory order of

1880, finding so much due on the bonds "*without prejudice, and that the complainants have a lien on the assessments,*" and permitting complainants to "file a bill or bills, original or supplementary, or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid," bind these defendants? Why should not this supplemental bill, or bill of review or revivor, as it is variously termed, have been filed sooner? How can these defendants who were not parties to the suit at that time, be estopped from setting up their defenses as soon as they are made parties? Most of these defendants, if they had ever heard or this suit having been brought, had heard of the result of the case of *Webster* v. *The People*, and supposed that decision had ended all action upon the bonds and the enforcement of the assessments, and that the whole matter had ended. One of the commissioners (Capt. Westlake) died in June, 1892, the other two commissioners heard nothing more of the suit, and nothing was done or proceedings taken for more than eight years. In the meantime the old levee had virtually become a thing of the past; it was and had been no protection for some years; the lands had depreciated in value until they were worth but little, if any, more than before any levee was built. The land was in as bad condition for agricultural and sanitary purposes as before the levee was built. The owners were hundreds of thousands of dollars worse off than they were before the levee was built; they supposed that they had lost all of their money expended in putting the lands in cultivation, and buildings and

improvements thereon, and that the purchasers of the bonds had lost their money, and that the whole matter was done with. Mr. Palms seems to have thought so too, or he would have filed this supplemental bill during his lifetime. However, after the amendment of the Constitution of the State in 1878, authorizing the legislature to enact laws to enable landowners to organize and build and construct *levees* to reclaim lands from overflows from rivers; and after the legislature had enacted the law of 1879, a petition in 1880 was presented to the County Court of Pike County, Illinois, by certain owners of land embraced in the old district, to organize a levee and drainage district under the new law, and take this old bed of a levee and reconstruct, rebuild, repair and keep up and maintain the same; and under such petition the Sny Island Levee Drainage District, the present organization, was perfected, and hundreds of thousands of dollars were raised by assessments upon the land benefited in the district for the purpose of rebuilding, changing the location of, repairing and keeping up this levee. There were many breaks in the levee; from year to year, lands would fluctuate in value, go up and come down, as the levee would break; tenants would be driven out, new assessments would be made, the levee would be repaired, and this condition of things continued. Still, Mr. Palms, in his lifetime, never had a supplemental bill filed, nor did his executors after his death until 1889, more than eight years after leave had been given to file the same; and the levee having become somewhat of a protection to the lands from overflow from the river, but not to the extent, however, of the money expended under the new or-

ganization in changing the location, rebuilding, repairing and maintaining the same, the complainants, by their counsel, filed this supplementary bill and by leave of court made various amendments thereto until the hearing of this case in November, 1895. As between all of these defendants and complaints, upon which side is justice, equity and right? If it should be held that the bonds can be enforced and collected in any manner, it would amount to a confiscation of all of the lands of these defendants, after they supposed all of the litigation over the bonds had ended, and they had expended almost the value of their lands in paying assessments to build and reconstruct, raise and change the location of the old levee bed, and were led to do so by this suit remaining in abeyance during all these years and no steps being taken.

As I understand the law, the doctrine of *lis pendens* does not apply to this case. After the decision in the case of *Webster* v. *The People*, there was no corporation with Messrs. Jones, Weelock and Westlake as commissioners in fact. The Supreme Court in that case had decided that all proceedings of this *quasi* corporation were void and without authority of law; that the construction of the levee as an independent work to reclaim lands from overflow from the river, and the issue of bonds to pay for the construction, and all assessments against the lands, were unauthorized by the Constitution and the statute; that the assessments could not be collected. The commissioners were not vested with any power—they were commissioners in name only from that time on; they being the only defendants in this case at that time, and they, being shorn of all power

and authority by the decision of the court in that case, could do nothing to bind the landowners, or to effect their rights, or to effect the land in the old levee district.

If complainants abandon the position that the bonds are valid, or if the court here should hold so, and complainants proceed upon the theory that they have an equitable lien upon the lands in the district or upon the old levee bed itself, or an equitable action against the landowners, present defendants, how could the order of the United States Circuit Court in this case, in 1880, bind the landowners or affect the lands when none of them were defendants, and were not made so by the supplementary bill for more than eight years after such order was entered? If the commissioners were representatives of the landowners and an order or decree of court against Messrs. Jones, Wheelock and Westlake could bind these defendants and affect their lands, what was the necessity to file the supplemental bill and make a thousand defendants? Why not avoid such enormous expense by continuing proceedings against Messrs. Jones, Wheelock and Westlake, as commissioners? The reason, I think, is apparent; no order or decree of court against Messrs. Jones, Wheelock and Westlake, as commissioners, or otherwise, could bind either the land or the landowners. Messrs. Jones, Wheelock and Westlake, having no power or authority, and no right to bind the landowners or the lands, any decree against them could not affect the lands, it therefore became absolutely necessary to give the court jurisdiction, to bring all of the present defendants into court; they not being parties to

the suit when such order was entered under the authorities cited, they could not in any manner be affected by such order.

VII.

Let us suppose, for the argument of the case, that the complainants do have some rights or equities against the lands benefited by the building, construction and maintenance of the levee. What equity or rights can complainants have against the land, or the owners of the lands in the lower end of the levee district? As heretofore stated in my statement, this levee district is about fifty-two miles long, three to five miles wide, and before the levee was built a branch of the river forming what is called the Sny or *Sni Earte* left the river near the upper end of the district and extended out into the lands, as indicated by the map in the printed record here, with numerous outlets to the river, the main outlet being at the lower end of the levee district—Hamburg bay; that the numerous large creeks coming down from the uplands extending through the bottom lands were emptied into this Sny, and from there into the river; but the building and construction of the levee cut off these outlets and also the inlet. Before the building of the levee, this Sny was a rapid running stream of from one to three hundred feet wide but, as shown in the evidence, since the building of the levee it has almost completely filled up; the creeks have no outlet to the river; all waters from these creeks are spread out over the lands adjoining them, or are forced through the levee district to the lower end, that be-

ing the only outlet, causing vast bodies of water to flow over these lower lands, which, before the building of the levee, emptied into the river at various places. Also, with a levee of this extent and height, when the waters in the river get high enough so as to inundate the bottom lands if no levee were there, the water backs around the lower end of the levee and covers the land of nearly one hundred of the defendants whom I represent, and others represented by other counsel for defendants, and during these times of high water and freshets the vast bodies of water coming down from the uplands into the lower end of the district, meets the back water, until at times the water has been three feet higher inside of the levee and over the lands in the lower end of the district than it has in the river. From the evidence of the witnesses, it is shown that a large portion of these lands have been completely destroyed for agricultural purposes, on account of the building and keeping up of this levee, which were worth from twenty-five to fifty dollars per acre before any levee was built. Suppose, for the sake of argument, that the money of Mr. Palms, and the other purchasers of the bonds, had built and constructed this levee, how could complainants have any remedy, right or equity against these landowners? Instead of their lands being benefited, they have been greatly damaged. See printed record of Z. T. Webster, the same Webster who is appellant in the case of *Webster* v. *The People*, so often referred to, p. 173; F. L. Zerenburg, pp. 175–177; Lemuel Long, 178, 179; Dr. J. S. Thomas, pp. 180–182; A. F. Furguson, 183–186; Frederick

Wiedman, 186,187; Dr. J. S. Thomas, 188–192; B. S. Jennings, p. 193; A. J. Lovel, pp. 193, 194; William Lovett, pp. 196, 197; M. J. Thompson, pp. 198, 199; James Ruyle, pp. 200, 201; John McLean, p. 202; and many others. Those having lands in that end of the district almost to a man opposed the drainage organization from the beginning, including the present levee system and organization. It must be conceded that complainants have no cause of action against those landowners, and why should they insist upon retaining those landowners in this suit, compelling them at great cost and expense, besides the worry and bother of going into court and proving facts that have already been so conclusively proven? I apprehend that complainants did not retain them as defendants so that they may come in by a cross action, and ask pay for the damages occasioned to their land on account of the building and constructing of the levee, from the bonds involved in this suit.

The allegation contained in the bill that the lands in the levee district, on account of the building of the levee, have been rendered of great va ue for agricu tural purposes, and greatly enhanced in value, can have no application to these lands, or to any other lands ying c ntiguous to the creeks running through this levee district; consequently, those lands have not been benefitted, but have been damaged, and upon the trial of this case in the Circuit Court, we think it should have been dismissed.

I am unable to reply to counsel for appellants or petitioners, as I have been so unfortunate as not to receive a

copy of his brief or any part of it, and have been compelled to anticipate what counsel may say, and in fact substantially use the same brief as in the Court of Appeals.

I would further call the Court's attention to the able and exhaustive opinion written and filed in this cause, in the Court of Appeals, and it will be observed that every question, being a number of them, which are fatal to the case of appellants, has been fully considered and supported by authority, by the eminent jurist who wrote the opinion, and upon either one of five grounds this cause should be affirmed; even if all but one should be reversed, either one of the grounds upon which the defense is based should affirm the case.

I respectfully insist not only that the great majority of my clients, who live in the southern end of the district and have been greatly damaged instead of benefited by the construction of this old levee, but all of the land owners in the leevee district, instead of being benefited, have been damaged, or nearly all of them, and that this cause should be affirmed and this litigation ended.

A. G. Crawford,

Attorney for the Defendants represented by him.

Jefferson Orr,

Associate Counsel for same Defendants.

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ADDITIONAL BRIEF FOR APPELLEES.

ASA C. MATHEWS,
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W. H. H. MILLER,
Counsel for Certain Appellees.

The Hollenbeck Press, Indianapolis.

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The writer of this brief, who has been but recently brought into the case, desires to add a few suggestions to the brief for appellees—not, it is hoped, in the way of repetition.

I.

Even if valid such assessments not collectible in this suit.

We want again to insist that these assessments, even if valid, would not be collectible in the United States courts, but, being liens purely statutory, must

be taken on the terms prescribed by the statute and can be collected only by the statutory method; and that the decisions cited by counsel for appellants are not to the contrary.

Section 29 of the act provides for the collection of these assessments as follows:

"SEC. 29. The commissioners, upon receiving such certified copy of such assessment, may proceed to collect the same, or any installment thereof, or they may certify such assessment, or any installment thereof, which they may be entitled to collect at the time, to the county clerk of the county in which the lands assessed may be situated, who shall extend the same, in a separate column, upon the proper tax-books for the collection of state and county taxes, and such assessment or installment thereof, so extended, shall be collected and enforced in the same manner as state and county taxes."

And Section 31 reads as follows:

"SEC. 31. When the commissioners shall have elected to collect any assessment or installment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or installment shall be due and uncollected, and as often as any installment shall become due and be uncollected at the time for making return of the tax books, for the collection of state and county taxes, next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any installment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of state and county taxes in the counties, or respective counties, where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amount so collected to the commissioner(s)."

The statutes of Illinois provide for the collection of taxes by distress and sale, not by a suit in court.

Accordingly the supreme court of Illinois has expressly adjudged that a lien for taxes can not be collected by suit in a court of chancery.

The People v. *Biggins*, 96 Ill. 481.

In that case the court very broadly declares that all statutory liens must be enforced in the mode prescribed in the statute. In the opinion much stress is laid on the distinction between statutory liens, such as taxes, judgments, etc., and liens by contract. This is the general rule.

Cooley on Taxation, second ed., p. 449–450.

Nor has this court decided otherwise, as counsel for appellants assumes.

On the contrary, the proceedings in the cases cited by him in support of his contention were all based on statutes making the assessments collectible by suit in the courts.

Thus, in *Fitch* v. *Creighton*, 24 How. 159, on page 161, it is said:

"Each municipal corporation may, either by a general or special law, or ordinance, prescribe the mode in which the charge on the respective owners of lots, or lands, shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment, or decree, was required to be entered severally."

In *Idaho, etc.*, v. *Bradbury*, 132 U. S. 509, we find the following on page 515:

"The present suit was brought to enforce a mechanic's lien created by the statutes of the territory, which authorize the court in such a suit to order both a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, 'in like manner, and with like effect, as in actions for the foreclosure of mortgages.' Idaho Code of Civil Procedure, sections 815, 826."

In *Hagar* v. *Reclamation District*, 111 U. S., page 701, on page 711, Mr. Justice Field, speaking for the court, says:

"The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No. 108* v. *Evans*, 61 Cal. 104."

So in *Jones* v. *Great Southern, etc.*, 86 Fed. Rep. 370, it is shown in the statute quoted, section 3185a, on p. 371, that the lien was to be enforced by a suit in court.

If *New Orleans* v. *Warner*, 175 U. S. 120, decides or intimates anything upon this question, it is not apparent.

Of course, no lawyer will question that when a statute gives a right enforceable by suit in equity in a state court, other conditions of jurisdiction being

shown, the right may be enforced by like suit in the federal court.

But that is not this case. Here we have an attempt to collect by suit in equity in the federal court a statutory tax or assessment which the statute says shall be collected by the statutory method of distress and sale.

We submit that, on principle as well as under the decision of the supreme court of Illinois in the Biggins case, *supra*, and the decisions of this court cited in our original brief, pages 47 to 55, these assessments, even though valid, are not collectible in this suit.

II.

Act invalid because it leaves amounts and times of payment of assessments to discretion of court.

Although it is so clear as to be scarcely open to question that the act of the legislature of Illinois of April 24, 1871, is invalid, for the reasons given by the supreme court of Illinois in *Updike* v. *Wright*, 81 Ill. 49, and *Webster* v. *The People*, unreported, and by Mr. Justice Harlan in this case, we submit that the act as to these assessments is invalid for still another reason.

Passing by the other provisions of the law, and not stopping to argue whether this act attempts to confer a legislative function on a judicial tribunal, we ask especial attention to section 27 of this statute.

"SEC. 27. At the time of confirming such assessment it shall be competent for the court to order the assessment of benefits to be paid in installments of such amounts and at such times as will be convenient for the accomplishment of the proposed work, other-

wise the whole amount of such assessment shall be payable immediately upon such confirmation, and shall be a lien upon the lands assessed until paid."

That is, the legislature attempts to delegate to the court the power, in its *discretion*, to fix the amounts and times for the payment of the assessments. It is submitted that this could not be left in the discretion of any tribunal, but must be fixed by law.

It is certainly not necessary to argue that these assessments rest upon the taxing power, although it is true that for some purposes special assessments are not treated as taxes proper.

Cooley on Taxation, 416;
Hagar v. *Reclamation District*, 111 U. S. 701.

But it is essential to the validity of any tax or assessment that it shall be made under a law that is definite, certain, and leaves nothing to the discretion of the taxing officers.

Cooley on Taxation, pages 33 and 244;
Barnes v. *Dyer*, 56 Vt. 469;
State Board v. *Holliday*, 150 Ind. 216;
Sears v. *Street Commissioners of Boston*, 53 N. E. 876;
State v. *New Brunswick*, 38 N. J. L. 190;
Charles v. *City of Marion*, 98 Fed. Rep. 166, 168.

If this provision of section 27, that the court can "order the assessment of benefits to be paid in installments of such amounts and at such times *as will be convenient for the accomplishment of the proposed work be valid*, then different times and different amounts might be fixed by the court in each county in the state where such work should be undertaken. Nay, more; the

same court, for different improvements, might fix different amounts and times of payment in the same county; and, by the strict letter of the statute, different amounts and times might be fixed for different parties under the same improvement, though it could hardly be claimed that such action would be valid. That is, the assessment is made payable, not according to law, but in the discretion of the county court.

We submit this is at variance with every principle of taxation, and is at variance with the oft-quoted declaration of this court that "ours is a government of laws and not of men."

III.

Law can not be made by estoppel.

The claim of a lien in this case by estoppel is a most remarkable one. The statute providing for a lien is unconstitutional, has been so adjudged, and, for the purpose of this contention of an estoppel, is conceded to be so.

But, it is said, some of these defendants encouraged the passage of this unconstitutional act; others encouraged the proceedings under the act; others have received the benefit of the work done while it was supposed the act was constitutional; and, therefore, all such parties, and all who are in privity with them with notice, are estopped to deny that as to them the statute was a good *law* and created a lien.

In the case of *Norton* v. *Shelby County*, 118 U. S. 425, page 442, Mr. Justice Field, speaking for this court, says:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection;

it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

South Ottawa v. *Perkins*, 94 U. S. 267;
Wilkes County v. *Coler*, 180 U. S. 506.

The situation, then, after the passage of the act of 1871, was as if no act had been passed. If no act whatever had been passed, would any lawyer contend that, by doing what these defendants did, a lien would have been fastened upon all this property?

By way of illustration, take the case of a mechanic's lien. It is purely statutory. Assume no statute upon the subject has ever been passed by the legislature of Illinois. A contractor with the knowledge of the property owner, for instance, proceeds to erect a house upon his (the owner's) lot. Having done so, he files a notice of an intention to hold a mechanic's lien and brings suit in court to enforce such lien upon the property for the amount of his expenditure. It is, of course, too plain for argument that no such lien could be maintained or enforced. But suppose that a statute has been passed which has been adjudged to be unconstitutional. It is, according to this court, precisely as if no statute had been passed at all. And, if that be so, it is equally plain that the lien can not be enforced.

The case of *Holcomb* v. *Boynton*, 151 Illinois 299, 300, 37 Northeastern 1031, is directly in point, and shows that the supreme court of Illinois denies the possibility of maintaining a statutory lien without a statute by means of an estoppel. In that case a statute had conferred upon the county court jurisdiction to enforce mechanics' liens. The necessary preliminary steps had been taken to entitle the contractor to his lien. A decree foreclosing the lien and ordering

the sale of the property had been taken. Subsequently to such decree the legislature repealed the act conferring the jurisdiction without any saving clause, and it was, of course, held that the proceeding could go no further in that court or under its decree. The party, however, in whose favor the decree had been taken, and the officers of the county court, did proceed to execute the decree. A sale was made by a special master, and redemption from this sale was made by one Boynton, the appellee, who was the owner of a judgment known as the Warren judgment. Boynton furnished the redemption money, and another sale was made at his instance after such redemption, and the property on such second sale was purchased by one Wild. After such second sale, a third sale was made at the instance of other judgment creditors upon their judgment. Thereupon, Boynton, the appellee, who procured the first redemption and had the sale on his judgment, filed his bill to enjoin a conveyance upon the third sale, upon the ground that the entire proceedings were void, by reason of the repeal of the statute as above set out. It was insisted, on the other hand, that he, Boynton, was estopped, by his action as heretofore set forth, to question the validity of the sale from which he redeemed, or to set up the repeal of the statute. The supreme court of Illinois decided otherwise, holding that several essential particulars of an estoppel were wanting: First, that there was no evidence of fraud; second, that the law was equally open to all parties; third, that there was no misrepresentation of facts, and where both parties are equally cognizant of the facts, both are presumed to know the law and there can be no estoppel.

In other words the supreme court of Illinois refused

to sanction the proposition that a law could be resurrected by estoppel. In the opinion it is said, almost paraphrasing the language of this court in regard to an unconstitutional law in the *Norton-Shelby Co. Case*, *supra*, "when a statute is repealed without such saving clause, it must be considered, except as to proceedings passed and closed, as if it had never existed." If a party may not estop himself to question the repeal of a statute and so resurrect it, then it is certainly preposterous to say that he may, by estoppel, *create* a statute.

Suppose one of these parties, who, it is claimed, has estopped himself to dispute the validity of the law in the case at bar, should do an act, such as filling up a drain or cutting the levee, as denounced in section 45 or 46 of the act of April 24, 1871, and, thereby, if the law were valid, subject himself to the penalties provided by sections 45 and 46. Would any lawyer have the hardihood to contend that, the statute having been pronounced unconstitutional, such party could be convicted and sent to jail, or fined five thousand dollars, because, notwithstanding the statute was unconstitutional, it was valid as to him by estoppel? In such case, if the statute were a law, he would be liable to those penalties. If he would not be liable, it would be because the statute is not law. And if those sections of the statute are not law, by what right or authority can this, or any other court, say that other sections of the statute are law?

Again, take this case, or take the case of street improvement liens, or the case of a mechanic's lien. In such case the statute declaring the lien generally makes a lien which is an incumbrance paramount to the rights of the wife of the owner. A sale under a decree enforcing such lien carries the entire title.

But suppose the mechanic's lien statute, or the street improvement statute, or this statute has been adjudged to be unconstitutional. By the general statutes of the state, it is not competent for the husband to encumber the interest of his wife in his property except by a deed or mortgage in which she joins. Yet the contention here is that by his own acts, with which she has nothing to do, he makes that to be a law which, as to everybody else, is not law, and thereby encumbers her property. He could not by any agreement that he might write or sign, or by anything that he might say, encumber her interest in the property to the extent of a dollar. But, according to the contention here, standing by with his hands in his pockets and not opening his mouth, but simply knowing that his property is getting some supposed benefit, he is able to do by estoppel what he could not do in any other way in the world.

Nay, more than that. These liens by statute take precedence over mortgages. If the statute is valid, the street improvement lien or the lien in this case would be slipped under a mortgage and take priority over it. The property owner could not, by any agreement that he could possibly make, accomplish any such result. The law has been declared to be unconstitutional and void,—in the language of this court, it is as "inoperative as though it had never been passed." And yet according to the contention of our opponents, the owner having only a naked equity of redemption, by simply standing by and getting for his property whatever supposed benefit may come in the way of improvement, does displace the mortgage and pass a lien underneath it which may take the entire property, leaving nothing for the mortgagee. Of course, he could do nothing of the kind by contract or

by any voluntary act on his part. If it be said the estoppel can not affect third parties, that is an admission that the estoppel does not make the law valid, but only goes to the personal obligation of the party standing by.

It seems to us that if statutes could be created in this way and have such far-reaching effect, legislatures might well be dispensed with.

What, then, is, and what is the extent and effect of, this doctrine of the creation of an obligation in such case by this doctrine of estoppel? It is respectfully submitted that, at the utmost, it is this much and no more. The property owner by standing by and assenting to the expenditure of money *upon his property*, may have estopped himself to deny an implied assumpsit to repay such expenditures. But he has not created a lien.

In order to create a mechanic's lien, several things are necessary.

First. A statute creating and providing for the manner of taking the lien.

Second. A contract express or implied on the part of the property owner to pay for the improvement.

Third. A compliance with the formalities required by the statute for the taking of the lien.

If the law exists and if the formalities required by the law have been complied with, then, if the property owner has stood by with knowledge, the promise to pay may be implied, and the property owner estopped to deny the same. But, without the law and without the compliance with the formalities it requires, the mere standing by, with knowledge, while it may create a personal obligation by estoppel, can not take the place of the statute and create a lien. As well say that, in such case, the property owner

has, by standing by, created and placed upon his property a mortgage.

So in the case at bar, conceding all that counsel for appellants claim as to the defendants standing by, and permitting the expenditure of *plaintiff's money* without objection, they would have estopped themselves to deny a personal obligation and nothing more, provided always the expenditure had been made on their property. A statutory lien can not be created without a statute. An estoppel in such case can go no further than a personal promise. And we suppose that, in the absence of a statute or any pretense of a statute, no one would assert that, if these people had orally promised that the holders of these bonds should have a lien upon their premises, such promise could be enforced as a lien in a court of equity. The difference between a statutory lien and a lien by contract is shown by the circuit court of appeals, in the sixth circuit, in *Richmond, etc.*, v. *Richmond, etc.*, 68 F. R. 105–109 and 110; also by this court in *McMurray* v. *Brown*, 91 U. S. 257–266, and by the supreme court of Illinois in Biggins case, *supra*. Moreover, complainants having attempted to obtain a lien by statute can not now rely on a contract or equitable lien.

Vane v. *Newcombe*, 132 U. S. 220–238.

And, whatever may have been said by any other courts, this court has not adjudged that a statute may be a law between A and B, and not a law as between B and C. On the contrary, this court has said:

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according

to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise."

Ottawa v. *Perkins*, 94 U. S., page 267, repeated in
Wilkes Co. v. *Coler*, 180 U. S. 520.

Nor is there anything decided in *Daniels* v. *Tearney*, 102 U. S. 415, or in any case therein cited except the Kentucky cases, at variance with this view. All that was necessary to be decided in that case, and all that was decided, was that the defendants by giving the bond and getting the benefit of the stay provided for by the unconstitutional statute, had estopped themselves to deny, as against the innocent obligee, their personal obligation under the bond, that is, an implied assumpsit to pay the same.

In this view that decision is entirely in accord with the declaration of this court in *Norton* v. *Shelby County* and in the *Town of South Ottawa* v. *Perkins* and in *Wilkes Co.* v. *Coler*. Upon any other view it is directly at variance with the law as declared in those cases, and would be an adjudication that a document "purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in

another case and for another party; a law to-day and not a law to-morrow; a law in one place and not a law in another in the same state."

It is easy to understand how a party having received a direct benefit under an invalid contract may be estopped to deny a promise, express or implied, to pay for the same. But how any citizen can be estopped in a court of justice to assert the invalidity of a statute is not so easy to be understood. And especially is this so where, as in *Daniels* v. *Tearney*, the law and the contract under it are adjudged void because treasonable and contrary to public policy.

Suppose that in the Daniels-Tearney case, instead of providing that a bond should be given, the statute of Virginia had provided that, without any action on the part of the defendants, all executions should be stayed until the end of the war, and in the meantime such executions should be a lien upon all the property of defendants, not only as theretofore within the particular county, but everywhere throughout the state. The defendant got the benefit of the stay thus provided by statute and failed to pay the debt. After the war is concluded and the statute has been declared to be unconstitutional, could the lien thus provided for be enforced? The statute did not create a lien, because it was no statute. There was, therefore, no lien to be enforced. Is the fact that the defendant got a benefit under the statute to supersede the necessity for legislation and create a statutory lien?

This court is on record, over and over again, to the proposition that where two parties are in *pari delicto*, as where a corporation has made a contract *ultra vires* merely—there being no moral wrong—the courts will not help either party to assert any right under the contract, and either party may raise the question.

This is not out of favor to either party, since "the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

This is the language of Lord Mansfield in *Holman* v. *Johnson*, 1 Cowper 341, quoted with approval by this court in *Pullman Car Co.* v. *Central Transportation Co.*, 171 U. S. 150, 151.

According to the Pullman case and the cases cited therein and the Terre Haute case, 145 U. S. 393, this court refused to give validity by estoppel to an *ultra vires* contract, involving no turpitude on either side. Upon what principle or course of reasoning, then, where two parties have proceeded with equal knowledge of law and facts, each acting for personal gain, one to have his property improved and the other to invest his money at large interest enhanced by a large discount, is either to be estopped as against the other to plead that a statute has been declared void as offensive to the organic law of the state? Especially where, as here, the property owner is deprived in the main of the benefit of the law, wherein is such an estoppel equitable? Both parties act upon the same motive. Nay, more, on what principle is a whole system of unconstitutional lien law to be created and enforced by estoppel in the latter case, when in the *ultra vires* cases the contracts are held void

at the instance of either party, although the full consideration may have been received, and a recovery can be had, as in the Pullman case, not on the contract, but on a *quantum meruit* only?

Moreover, nothing is better settled than that, as against the statute of frauds, the receipt of the entire purchase-money by the vendor of real estate will not estop him to plead the statute, and will not take the case out of the statute. In such case the contract is voidable, and the vendee can only recover back his purchase-money. Is it not absurd to say that in such case there is no estoppel to plead the invalidity of a mere contract, while in the case at bar there is an estoppel to plead that there is no lien to be enforced, because the statute purporting to create such lien is at war with the organic law of the state?

The whole theory of such an estoppel is illogical.

No definition of estoppel can be found broad enough to cover such contention. In those definitions, always and everywhere estoppel is as to facts, not law. Law can not be made or unmade by admission, assertion or denial. In all the elementary books, no one can be found giving estoppel as one of the sources of the law. Constitutions, ordinances, statutes, customs, these and their like are the sources of law in constitutional government. But estoppels, assertions, admissions, agreements, never. These may make, establish and forever settle facts, but not law.

Doubtless, a party may in circumstances of confidence state the law and be precluded from afterward denying that he stated it truly; but in such case he would be so precluded, on the ground of fraud, because his statement was made under circumstances that warranted the other party to rely on his statement as a true statement of a fact within his knowledge and

of which the other party was ignorant. In such case the statement of the law is the statement of a fact in just the same way that proof of a foreign law is made by lawyer witnesses to a jury. But even in such case the estoppel could go only to the person. It could not make a mortgage or conveyance of real estate without a compliance with the requirements to that end; it certainly could not make a statutory lien without a statute.

The situation now as to the law can not be different from what it was when the levee broke and the law was declared unconstitutional in 1876.

Suppose one-fourth of the property owners had done the acts claimed to make the estoppel. One-fourth, then, according to appellants, were liable to assessment. One-fourth enough money could be obtained to pay for and keep up the work. But of what use would such a levee be. Of course an uncompleted and an unrepaired levee is no better than none. Are these owners of one-fourth of the lands to be assessed to make a part of a levee?

The truth is, this attempt by the courts through estoppels to resurrect dead statutes results, as such attempts to warp principles to prevent particular instances of supposed injustice always do, in making absurd and indefensible precedents. The legislature is forbidden to enact special legislation, but courts and juries by estoppel may make a different law for every different case; nay, different courts with different juries may make a different law for exactly the same case. Upon principle the law is supposed to be fixed, certain and known of all men. The contention here is that, as to these one thousand defendants, there are as many laws as parties in varying conditions. Commodities can be weighed and measured

only by fixed standards—pounds, and yards, always the same. So, alongside laws fixed and certain, facts may be laid, and human conduct fairly judged and regulated. But, once admit the free coinage of laws by courts and juries for each lawsuit and litigant, and the free coinage of silver will no longer be open to criticism.

IV.

No estoppel as to any property owners because benefit is only indirect and common to all.

But there is another reason why this theory of a lien or obligation by estoppel can not be maintained in this case. This levee was to be about fifty-two miles long. It was supposed that, if constructed and maintained according to the plan, it would protect something like one hundred thousand acres of land from the overflow of the Mississippi. It is conceded by counsel for appellants that, as to a large part of the owners of these lands, no lien can be successfully claimed or enforced, because it is conceded that they have done nothing to create a lien by estoppel. It is, of course, conceded that as to all of the lands, except the strip taken for right of way and immediately covered by the levee, the work was not constructed upon the lands of the defendants. In other words, most of the farms which it is claimed were benefited, or were expected to be benefited by the levee, were more or less remote therefrom. The theory of the complainants is, however, that by reason of the fact that the owners of these lands got some benefit from the levee, and by reason of the further fact that it is claimed that some of them had to do with the passage of the statute, that others, by petition, encouragement or

otherwise, invoked the application of the law, therefore there was created an obligation to pay, and a lien as security for such payment.

A careful examination of the authorities upon this subject shows that this contention is not maintainable. The parties who aided in procuring the adoption of the supposed statute, or who invoked its application, are benefited, if benefited at all, only in common with all the other owners of the one hundred thousand acres of land. No special or peculiar benefit has been conferred upon their lands. The improvement, if it be an improvement, has not been made upon their lands. The benefit is indirect and incidental, and is received in common with all the other owners of the property in the district. In such case it is submitted there not only can be no lien, but there is not even an implied obligation to pay.

Thus, in the case of *Cincinnati S. & C. Railroad* v. *Bensley*, 51 Fed. 738, circuit court of appeals, sixth circuit, the opinion of Mr. Justice Brown seems to us to be very directly in point. In that case, it being proposed to purchase a certain site for a board of trade building in Chicago, subscriptions were sought from the owners of neighboring property, on the theory that the value thereof would be largely increased by the erection of such building. Defendant, among others, signed this subscription, being induced thereto by "the probable increase in value of neighboring estates, and the further consideration that the board of trade shall erect and complete said proposed building and occupy the same for its regular sessions within two years from January 1, 1881." It was held that time was of the essence of the contract, and, the purchase and completion of the building not being within two years, the express promise failed. There-

upon it was contended that the subscribers were liable as upon a quantum meruit. Justice Brown, however, distinctly repudiates this contention; and, while he agrees that the property of the subscriber in the neighborhood was doubtless increased in value, yet it was only so increased in common with that of other holders of property in the immediate neighborhood, who, it was conceded, would not be liable, and therefore the defendant was not liable. It is shown in the opinion, upon a very full discussion, that the principle upon which parties are held liable upon a *quantum meruit*, by reason of improvements made, applies only where the improvements are made on their property, and has no application in other cases.

In the course of the opinion his honor quotes from the opinion of Mr. Justice Brewer of the supreme court of Kansas in *Railway Company* v. *Thompson*, 24 Kan. 170. In that case it was sought to hold the City of Parsons for improvements made by a railroad company in the city, the improvements being made upon the property of the company, and it was held that, the conditions of the express promise not having been complied with, there was no implied promise to pay, and the city was not liable.

The same doctrine is very fully discussed and adhered to in *Traveller's Insurance Co.* v. *The Mayor of Johnson City*, 99 Fed. Rep. 663 (circuit court of appeals, sixth circuit). The syllabus in that case is as follows:

"A purchaser, in the market, of negotiable bonds payable to bearer, and unindorsed, issued by a city to a railroad company of another state, to whom it had no power to issue the bonds, in payment of a subscription to the company's stock, which it had no power to make, although it had power to subscribe for the stock of a domestic corporation, and to issue its bonds in

payment therefor, can not recover from the city the amount paid for such bonds as money had and received to the city's use and benefit on the ground that the stock had been delivered and retained, and the railroad and a depot constructed, which were the conditions upon which the subscription was made. In such case the stock was void in the hands of the city for want of power on its part to become a stockholder; and the railroad and depot, built on lands owned by the company, did not become property of the city, or confer upon it any such direct benefits as could raise an implied promise to pay therefor independently of its void contract."

In the course of the opinion in that case, Judge Taft quotes from the opinion of Mr. Justice Jackson in *Hedges* v. *Dixon Co.*, 150 U. S. 182, 186. In that case the county had issued bonds in aid of a railroad in excess of its authority, and the holders of the bonds filed a bill in which they asked from the court the relief of cutting down the obligation of the bonds proportionately so as to bring it within the lawful amounts. The supreme court held that the relief could not be granted, and referring to the cases of *Louisiana* v. *Wood*, 102 U. S. 294, and *Read* v. *City of Plattsmouth*, 107 U. S. 568, in which it had been permitted to holders of the bonds issued without authority to recover from the municipal corporation issuing the bonds the amount of money received and expended by it for lawful purposes as money had and received for its use, this court said:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from

the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

Just so in the case at bar. No improvement has been made upon the property of the defendants, who it is claimed are estopped, nor have they received any benefit peculiar to themselves or different from that of their neighbors, owners of other parts of the hundred thousand acres designed to be protected by the levee, and who it is conceded are not liable, and can not be made liable, by estoppel.

The use, so far as the same was used, of the levee partially constructed under the contract, could no more operate as an estoppel upon these property owners, than the action of the city of Galesburg, in taking possession of and using the water mains, could estop the city in the case of the *Farmers' Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156. Indeed the decision in the Galesburg case is in many ways much in point here. It was held there that the contract of the water company was not merely to build a system of water-works which the city authorities would accept once for all, but that their obligation was to construct a system that would be operative to furnish a supply of good water, just as we maintain here that the contractors were bound to make a levee which would protect this property. It was held that the consideration and obligation in the Galesburg case were continuing. And so we maintain here that the consideration on which these property owners went into this scheme at all was that, under the law, the levee could be maintained, as well as originally constructed.

Surely if the attempt had been made to raise funds

for the construction of this levee by contract instead of by a tax, and if the parties had undertaken to pay their several subscriptions in consideration of the construction and maintenance of the levee, and if the parties having the work in charge had undertaken to provide only for construction and not at all for maintenance, no one would contend that the subscriptions could be enforced. And certainly no court could be found to adjudge that the maintenance was not just as important a part of the consideration as the original construction, or that the consideration was separable and not entire, or that the subscription would have been made for the construction independently of the maintenance.

Here, as pointed out in our original brief, not only did the consideration which the property owners expected fail as to obtaining money by assessments to make repairs, but even the original construction entirely failed to meet the requirements of the contract. This is proven by the testimony of a score of witnesses.

V.

No estoppel or liability because contract made and bonds issued in violation of statute.

But there is still another ground upon which this alleged estoppel and liability necessarily fail. It is claimed on behalf of appellants that the parties who were instrumental in procuring the passage of this pretended statute, and those who were instrumental in having it put into operation, are estopped to question its validity or to deny their liability under the same.

Of course, we maintain, as was held by Mr.

Justice Harlan in the circuit court of appeals, and as we think is the universal doctrine, that no man can be held liable for the enactment of a law; that it must and will be conclusively presumed, with reference to any statute, that it is the expression of the intelligence and conscience of the legislators, uninfluenced by any outside considerations.

But waiving that, for the sake of the argument, it can not be successfully claimed that any of these parties who were influential in procuring the enactment of this statute, or who were influential in setting the same in operation, intended or were responsible for anything done not according to the terms of the alleged statute. If a man is to be held responsible for procuring the enactment of a statute, or for putting it in operation, that responsibility must be according to the terms of the statute. But in this case, at the very start, the commissioners directly violated the terms of the statute, and entered into a contract not within the contemplation of the statute, and which was directly in the teeth of their obligations to the property owners.

Section 35 of the statute (brief of Gen. Duffield, page 118) reads as follows:

"The commissioners may borrow money not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

That is, the commissioners had authority to "*borrow money*," and to secure the same by notes or bonds bearing interest at a rate not exceeding ten per cent. per annum. Did they borrow money? Not at all. But they entered into construction contract with Skelsey, Fuller & Pierce, by the terms of which the contractors were to do the work, and were to be paid therefor in these very bonds at *ninety cents* on the dollar, or at a discount of ten per cent.

Transcript, page 374.

Was this the equivalent of borrowing money? Was this obeying the mandate of the statute that required that the bonds should not bear interest at a rate exceeding ten per cent? Were the commissioners, under that statute authorizing them "to borrow money," and to issue the bonds to bear interest not exceeding ten per cent., for an amount not exceeding the then unpaid assessment, at liberty, instead of borrowing money, to make a contract for the work, and barter the bonds at a discount in payment therefor? Upon principle it is submitted any one would answer this question in the negative; and it has been so directly adjudged by the court of appeals of New York in decisions which have the sanction of this court.

Gould v. *Town of Sterling*, 23 N. Y. 456, 458;
Starin v. *Town of Genoa*, 23 N. Y. 439, 454.

In these cases the statute authorized the officers of the town to borrow money and to pay it over to the president and directors of the railroad company to be expended by them in creating and constructing a railroad, etc. The statute, as in the case at bar, limited the rate of interest but did not say anything about not

putting out the bonds at less than par; it was in these respects just like the statute here under discussion. Instead of borrowing the money, the supervisor and commissioners delivered over the bonds of the company in payment for stock for which they were authorized by the act to subscribe, and the company sold them at a discount. The question was whether this was within the authority conferred by the act, and it was held not to be within such authority, and that the bonds were void.

These decisions were reaffirmed by the court of appeals of New York in the case of *Horton* v. *Town of Thompson*, 71 N. Y. 513, in an opinion of which the following summarizes the results.

Horton v. *Town of Thompson*, 71 N. Y. 513.

RAPALLO, J. "The act under which the bonds in question in this action were issued required among other things that before contracting the debt or issuing the bonds the written consent should be obtained of a majority of the tax-payers stating the amount of money authorized to be raised and the railroad company in the stock of which such money should be invested. The commissioners to be appointed under the act were thereby authorized to borrow the money on the credit of the town. They were authorized to dispose of the bonds, but for not less than par, and the money to be thus raised was required to be invested in the stock of such company, meaning evidently the company named in the consent. The act further required that such money be applied to the construction of the railroad and to no other purpose. These provisions were intended to secure the application to the construction of the road, for whose aid the bonds were to be issued, of the full amount of the money for which the tax-payers should consent that the credit of the town be pledged without deduction or discount. * * * The money was to be borrowed and the bonds issued by the commissioners to be ap-

pointed in the manner prescribed by the act. These commissioners were in no sense town officers nor did they represent the town. (*Sheboygan County* v. *Parker*, 3 Wall. 96.) * * *

"The only authority given to the commissioners by this consent was to proceed according to the provisions of the act of 1868, that is, to borrow money by disposing of the bonds at not less than par and to invest the money so raised in the stock of a railroad company. They were not authorized to issue bonds in exchange for the stock of any railroad company. Such a proceeding was wholly unauthorized and was in substance prohibited by the act referred to in the consent, and would defeat one of its most important objects. As said by Grover, J., in the case of *People* v. *Batchelor*, 53 N. Y. 128, under the act of 1867, which contained the same provision as the act now under consideration, care was taken that the bonds should not be issued for less than their par value in cash; thus, there would, in case the town were bonded, be secured for the construction of the road cash equal to the principal of the bonds. If the bonds are delivered to the company on the receipt of the stock pursuant to the act of 1870, the bonds become the property of the railroad company, and may be sold upon the market much below par, and thus much less money accrue therefrom for the construction of the road. It is obvious that the consent does not embrace such a transaction. The same point was adjudged in *Starin* v. *Town of Genoa* (23 N. Y. 439) and *Gould* v. *Town of Sterling* (23 N. Y. 459), and it was held in those cases that no recovery could be had upon the bonds thus issued in violation of the provisions of the act authorizing them."

Accordingly the bonds, $148,000, were adjudged void, being issued for stock and not according to the terms of the act; and, although they were negotiable in form, the holders were chargeable with notice. It was also held that by accepting the stock the town

had not ratified the issue or waived any irregularity and was not estopped. It was also declared that the "commissioners are not the town; they are not officers of the town nor representatives appointed by it. They are mere instruments created by the legislature to carry into effect the provisions of the act of 1868, and have no powers other than those contained in that act. * * * The town is not therefore bound by the acts of the commissioners beyond or in contravention of the act of 1868 and the consent given thereunder."

It was further held that these bonds having been thus issued without the consent of the tax-payers, the legislature could not ratify and make them a valid debt, because, though the legislature could *authorize* the town to take stock and create a debt, it could not impose on the town an *obligation* to do so without the consent of the tax-payers. This, it will be noticed, is in accord with what was held by the Illinois court in the Updike case.

In the case of *Rogers* v. *City of Burlington*, 3 Wall. 654, the question was presented to this court whether a city having power "to borrow money for any public purpose" has authority to aid in the construction of a railroad company; and, by the majority of the court as then constituted, the question was decided in the affirmative; and it was adjudged that as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds to be sold by the railroad company to raise money. It was also held in the same case that, power to issue the bonds being shown, the municipal corporation, *as against bona fide holders of them for value*, is estopped to deny that the power was properly executed. Instead of borrowing money directly, the city issued and lent to

the railroad company seventy-five thousand dollars in its bonds payable in twenty years with interest at ten per cent. per annum, the payment to be secured by first mortgage bonds of the company on the second section of the road. The opinion in that case was delivered by Mr. Justice Clifford, Justices Wayne, Swayne, Nelson and Davis, concurring. A dissenting opinion was filed by Mr. Justice Field, in which the Chief Justice and Justices Grier and Miller concurred. As above stated, in the majority opinion, it was held that, as against an innocent purchaser for value, the city could not question the manner in which these bonds, which were negotiable upon their face, were issued. Mr. Justice Field, however, speaking for the minority of the court, emphasized the familiar doctrine that a municipal corporation has only the powers expressly granted or necessarily implied, and that the power must be exercised substantially in the mode designated, and, insisting that the loaning of the bonds by the city to the railroad company was not a "borrowing money" within the terms of the statute, said:

"Here the authority conferred is to *borrow money;* yet no money was borrowed, but the bonds of the city were lent. Borrowing money and lending credit are not convertible terms. The two things which they indicate are essentially distinct and different. * * * The question presented is not a new one. In *Gould* v. *The Town of Sterling*, a statute of New York had authorized the officers of the town to borrow the sum of twenty-five thousand dollars, and pay it over to the president and directors of a railroad company, to be expended by them in grading and constructing a railroad. Instead of borrowing the money, the officers of the town delivered over the bonds of the town to the company in payment for stock, for which they were authorized by the act to subscribe, and the company sold them at a discount. The question was, whether this was

within the authority conferred by the act? Mr. Justice Selden, speaking for the court of appeals of New York, in an opinion of marked ability, answers the question in the negative. 'It is clearly,' says that learned justice, 'not within its language. No money was borrowed, and nothing else was authorized by the terms of the act. If, however, what was done was the same in effect as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material. But it is plain that neither in respect to the railroad company nor the town was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds to expend upon their road. As it was, they were compelled to sell the bonds at a discount in order to realize the money. * * * It is true the town did not itself sell the bonds, nor make any sacrifice upon them. It transferred them to the railroad company at par, in payment for stock, for which it was authorized to subscribe. This, however, does not strengthen the plaintiff's case. It was as much a departure from the terms of the statute as if the town had itself sold the bonds at a discount, and was equally inconsistent with the object and intent of the act, which was, that the railroad company should receive a sum equal to the amount of the debt incurred by the town to expend upon the road, in the completion of which the town was supposed to have an interest. There is, therefore, in this case, not only a literal but a substantial difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were, consequently, void in the hands of the railroad company; and as the referee has expressly found that the plaintiff became the purchaser with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself.'

I can add nothing to this language, or to the cogency of the reasoning of the learned judge. Every word is applicable to the case under consideration."

In the case at bar there is no pretense that the bonds are commercial paper, or that Mr. Palms got any better equities than the contractors had.

While in *Rogers* v. *Burlington* the majority of the court did not contravert the doctrine of *Gould* v. *The Town of Sterling*, but only decided that, as against *bona fide* holders, the town could not dispute that the bonds were properly issued, yet even as to what was decided in that case the decision has since been expressly overruled.

Brenham v. *The German-American Bank*, 144 U. S. 173, 187;

Barnum v. *Okolona*, 148 U. S. 393.

We submit the opinion of the minority in the Roger's case, therefore, stands now as the law in this court.

The supreme court of Indiana has had this precise question under consideration in two or three cases, and emphatically endorsed the decision in the case of *Gould* v. *The Town of Sterling* and *Starin* v. *The Town of Genoa*.

Rushville Gas Co. v. *City of Rushville*, 121 Ind. 206, 214.

In the opinion in that case the court says:

"The case of *State, ex rel.*, v. *Hauser*, 63 Ind. 155, does not decide that a city may not issue bonds to pay for water-works purchased; what it decides is, that a city may not issue and sell bonds in order to obtain money to construct water-works. The difference between that case and this is very broad and very plain; here bonds are to be issued to pay for property purchased; there they were issued to be placed on the market for sale. Issuing bonds to pay for property purchased is a very different thing from issuing bonds to obtain money."

So in *City of Richmond* v. *McGirr*, 78 Ind. 192, an attempt was made to maintain that the contracting of a debt by a municipal corporation was the same thing as the borrowing of money, and the court said:

"But it is insisted that the purchase of the lot and the agreement to pay the consideration therefor were the same thing as borrowing money; that it was in substance Price paying his indebtedness to Morrison, and Morrison loaning the money to the city. The city got no money by loan or otherwise, but it got the property and agreed to pay for it. We can not see anything like a loan in the transaction." Citing

Gelpcke v. *Dubuque*, 1 Wall. 221;
Gould v. *Town of Sterling*, 23 N. Y. 458.

Just so in the case at bar. The commissioners, under section 35 of the act of 1871, had no authority to use the bonds in question except as evidence of money borrowed. They had no authority to trade them for labor and materials, even at par, much less cause an increased rate of interest by bartering them at a discount. The property owners, supposing this law was capable of execution and was to be executed, were interested that every dollar obtainable upon those bonds should be available for the construction of the work. If, as is said in the Gould case, the bonds could be bartered at a discount of ten per cent., they could be bartered at a discount of twenty or thirty, and value received by the property owners would be reduced accordingly. The statute authorized the commissioners to borrow money, and issue bonds as evidence and security for the same; but they were not authorized to issue bonds in excess of the money borrowed, whether at the rate of two for one, four for three, or nine for ten.

This contract, then, being invalid, the bonds, according to the decisions cited, were void; and not being issued or used in conformity with the requirement of the statute, there is not the slightest ground upon which to claim any estoppel against any of the property owners.

Directly in line with these decisions is:

Travellers' Insurance Co. v. *Mayor of Johnson City*, 99 Fed. Rep. 663;

Johnson City v. *Charleston*, 100 Tenn. 138, 44 S. W. 670;

Callahan v. *Town of Alexandria*, 27 So. 540, 52 La. Ann. 1013.

VI.

Laches.

Upon the question of laches we desire to add a few words. The act of 1871 was declared invalid by the supreme court of Illinois in 1876, the bonds at the same time being adjudged to be void.

Updike v. *Wright*, 81 Ill. 49;

Webster v. *People*, same term, unreported.

The act and all proceedings thereunder being thus at an end, complainants' testator thenceforward had no express contract. His money had been invested upon what were supposed to be valid obligations payable out of a special fund to be derived from assessments upon property within a specified taxing district. But the obligations were adjudged void. The taxing district was adjudged to have no existence. Thereupon complainants' testator was remitted to whatever rights he might have, if any, by reason of having advanced the money. What were those rights? Upon

the theory most favorable to Mr. Palms, if the moneys had been advanced to a municipal corporation and had gone into its treasury and been applied to the use of such corporation, an assumpsit might be implied to repay the money. That would be the utmost that could be claimed in such case for Mr. Palms, and the right of action to enforce such repayment would have been immediate, either upon the original advancement of the money, or, at any rate, upon the adjudication that the statute and the bonds were void.

Merrill v. *Town of Monticello*, 72 Fed. 462 (C. C. A.);
Bank v. *Townsend*, 139 U. S. 67;
Parkersburg v. *Brown*, 106 U. S. 487;
Louisiana City v. *Wood*, 102 U. S. 294.

Is there any room for doubt, in the case at bar, when the supreme court of Illinois adjudged this statute and the bonds issued thereunder to be invalid, that whatever right of action, whether at law or in equity, Mr. Palms had immediately accrued? It was not a question whether his bonds were due. He had no bonds. It was not a question what were the terms of his contract. He had no contract. He had advanced money under circumstances which, assuming all that he contends for, gave him an implied assumpsit or an equity to demand its repayment, and, if not repaid, to enforce such repayment by action, or by suit to enforce a pretended lien upon these lands. If his right to sue (supposing he had such right), did not accrue then, when did it accrue? And if it did accrue at that time, it is submitted that it was completely barred by the statute of limitations of Illinois long before any one of the defendants as land-owners was brought before the court.

Section 15, act of April, 1872 (Starr & Curtis' Annotated Statutes, volume 2, page 2624), reads as follows:

"SEC. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for injury done to property, real or personal, or to recover damages for the detention or conversion thereof, *and all civil actions not otherwise provided for*, shall be commenced within five years next after the cause of action accrued."

That this proceeding is bottomed on an implied obligation by these property owners to pay their respective shares of this money by reason of the supposed benefit received, is entirely clear. At any rate it is an attempt by a proceeding in court to enforce such payment. If it were an action at law, there would be no question that it was squarely within the terms of the above section of the statute. It is none the less so because it is a proceeding in equity to reach the same end.

Thus in *Junker* v. *Rush*, 136 Ill. 179, it is adjudged that where a surety has paid the obligation of his principal and seeks indemnity, although he seeks it by means of a bill in equity with a view of being subrogated to the rights of the creditor against the principal in the judgment, yet, such proceeding is barred by the five years' limitations.

So it is adjudged, in Illinois, that money advanced upon a forged note and mortgage can only be recovered back by a suit within five years from the time the same is advanced.

Lunt v. *Wrenn*, 113 Ill. 168–177.
Wilson v. *Williams*, 42 Ill. App. 612.

And it has been expressly adjudged, and is the set-

tled law of Illinois, that courts of equity do not merely follow the analogy of the statute of limitations, but that they are bound thereby the same as the courts of law.

Bonney v. *Stoughton*, 122 Ill. 536;
Story's Equity Jurisprudence, section 529.

Such being the law of Illinois, it is also the law for the federal courts.

Amy v. *Dubuque*, 98 U. S. 470;
Ewell v. *Daggs*, 108 U. S. 143.

The lien is a mere incident to the debt or charge.

Carpenter v. *Longan*, 16 Wall. 271;
Chicago Railway Co. v. *Merchants' Bank*, 136 U. S. 268–283.

And a tax is a debt in such a sense as to be barred by statute of limitations.

Bristol v. *Washington Co.*, 177 U. S. 133.

Upon principle, as well as under the above authorities, it may well be insisted, if it were necessary to make such claim, that the right of action of Mr. Palms accrued immediately upon the payment of his money, assuming that he has a right of action at all. When he bought the bonds, the statute of 1871 was void. The subsequent decision of the supreme court of Illinois did not create a new condition. It simply adjudged and declared a condition already existing, namely, that that statute was unconstitutional and void. The payment of the money, therefore, was a payment altogether outside of any legal warrant. This court has held that where a bank pays money upon a forged check, with a forged endorsement, both parties supposing the signatures

to be genuine, the right of action to recover back the money accrues at the date of the payment and the statute of limitations begins to run from that date.

Leather Manufacturers' Bank v. *Merchants' Bank*, 128 U. S. 26.

But whether the cause of action accrued when the money was paid over in 1872, or when the law was adjudged void in 1876, or when the final leave was granted to bring in the land-owners as parties in 1881, any proceeding in the courts for the collection of the same was barred long before either one of the defendants as land-owners was brought into court. The suit against the commissioners did not seek to enforce any claim against them or their lands as such. That suit, commenced in 1878, was against them in their supposed official capacity, and sought only relief against them as commissioners. And thereafter eleven years elapsed before a single one of the land-owners was made a party defendant or brought into court.

And it is to be borne in mind that there is nothing in the suggestion that the complainants did not obtain a final and definite leave to bring in the property owners until 1881. They did not need leave to bring in the property owners. They had a perfect right to bring their bill in equity against the property owners at any time, without leave of any court, except as they may have voluntarily deprived themselves of that right.

We have then this situation. Mr. Palms purchased non-commercial bonds upon the supposition that they were valid bonds. It turned out that there was no law for the issue of such bonds. No such corporation or body or commissioners as purported to issue them existed, and his bonds were void. He is now

trying to collect the money so advanced from the owners of property which he claims was benefited thereby. But before bringing a single one of these bondholders into court, there elapsed from the time he advanced the money in 1872, seventeen years; from the time he commenced his suit against the commissioners, May 4, 1878, eleven years; from the time he took his first leave to make property owners parties, March 13, 1879, ten years; from the time, July 7, 1880, he took the final leave of court to bring in the property owners as parties, nine years. In the meantime the property was changing hands, owners were dying, heirs were succeeding to inheritances, the levee repeatedly broke, the property was all inundated and all improvements swept away several times, with a loss to the property owners of several millions of dollars. Some hundreds of thousands of dollars, raised by voluntary contributions, by government appropriation, and by assessment on the property under a new law, were expended in trying to reconstruct the levee before it would at all answer its original purpose. In the meantime, Mr. Palms and his executors were waiting and watching from the hill tops to see whether anything would be created in this marshy valley that would warrant an attempt to enforce his claim. It seems to us that to say that the complainants are not barred by laches in such a case, is to say that neither limitations nor laches as a defense will be recognized in a court of equity.

Respectfully submitted,

W. H. H. MILLER,

Of Counsel for Certain Appellees.

A. C. MATHEWS,

THOMAS WORTHINGTON,

HARRY HIGBEE,

Counsel.

No. 241. 38.

Office Supreme Court U. S.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

Motion to Continue.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1900

Filed April 8, 1901.

MICHAEL W. O'BRIEN, et al, Executors, Etc.,
COMPLAINANTS AND PETITIONERS,
vs.
JOHN G. WHEELOCK, et al,
RESPONDENTS.
No. 241.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR CONTINUANCE.

BENJAMIN HARRISON,
ASA C. MATTHEWS,
THOS. WORTHINGTON,
Counsel for Certain Respondents.

HARRY HIGBEE,
J. OTIS HUMPHREY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1900

MICHAEL W. O'BRIEN, et al, Executors, Etc.,
COMPLAINANTS AND PETITIONERS,
vs.
JOHN G. WHEELOCK, et al,
RESPONDENTS.
No. 241.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The undersigned counsel, for certain of the respondents, in the above entitled cause, respectfully represent and show unto the court:

FIRST, That they are counsel for some seven hundred of the respondents, as aforesaid, and that in their opinion, and in the opinion of their said clients, they cannot safely proceed to the argument and final trial of this cause at the present term of this court on account of the death of Benjamin Harrison, which occurred at his residence at Indianapolis, Indiana.

on the 13th day of March, 1901. In support of said statement they state the fact to be that when the litigation in the above case was commenced in the Circuit Court of the United States for the Southern District of Illinois, said respondents retained as counsel the Honorable Milton Hay and Henry S. Green, of Springfield, Illinois. That, prior to the argument of the said cause in said Circuit Court of said Southern District said Milton Hay departed this life; that at the argument of said cause in said Circuit Court,, the principal argument was made on the part of the respondents by Henry S. Green. that said cause, on the hearing, was decided in favor of these respondents, and a decree entered dismissing the bill of complainants—petitioners herein. That the petitioners prayed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and that said appeal was argued in said Court on the 7th day of June, 1898, on behalf of respondents aforesaid, by said Benjamin Harrison and Henry S. Green, assisted by Thomas Worthington. That since the argument of said cause in the said United States Circuit Court of Appeals, said Henry S. Green has died. That since the death of said Henry S. Green, the respondents herein being owners of the land in question, employed said Benjamin Harrison to prepare a brief for the argument of the said cause in this Court, and to make the principal oral argument on the hearing thereof. That said Benjamin Harrison undertook the service, and was paid and received a retainer therefor, and had his brief partly prepared at the time of his death, but not fully completed, and counsel aver that it embraced only one proposition of defense herein.

Said counsel state that the amount involved in this case, as claimed by petitioners, is something over eight hundred thousand dollars ($800,000); that petitioners claim that said amount is a valid, subsisting, equitable lien on one hundred and ten thousand (110,000) acres of land locaetd in the counties of Adams, Pike and Calhoun, in the state of Illinois. That this cause, and the questions involved therein, are of great importance, involving, among other things grave constitutional questisns, and the record, as will appear from inspection, is exceedingly voluminous. They aver that said Milton Hay, Henry S. Green and Benjaman Harrison were all attorneys of great ability and wide reputation, and have been employed on account of their great experience and high standing as members of the bar.

Counsel aver that while they themselves have been connected with the case from its commencement, up to and including the present time, yet since the employment of Benjaman Harrison, as aforesaid, they have relied upon him to make the oral argument in the case before this court. Counsel further state that in view of the gravity of the question, and being land owners as well as counsel in the case, it is their urgent desire that other counsel be employed in place of Benjaman Harrison to conduct the oral argument for the defence, upon the hearing of this case in this Court.

They further aver that as soon as possible after the death of the said Benjamin Harrison, they conferred with representaatives of their numerous clients, and it was determined by the conference that additional counsel be retained to take the place

of the said Benjamin Harrison in the argument of this cause. They further state that in view of the short time intervening before this case is set for hearing, the importance of the question imvolved, and the extent of the record, it would be impossible for counsel not already familiar with the case to prepare for argument thereof at the present term of this Court, and that unless a continuane be granted, it would be impossible for them to secure the service of such additional counsel.

Counsel further state that in view of the embarrasing situation of the respondents, consequent upon the facts aforesaid, and for the purpose of avoiding a continuance if possible, they, on the 18th day of March, 1901, wired Mr. Henry M. Duffield, counsel for petitioners, a proposal that the cause be submitted without oral argument on printed briefs and arguments, but that this proposition was declined by Mr. Duffield.

They further state that they are anxious that this cause shall be tried, and the rights of the parties fully determined at the earliest possible day. That during the whole of this long litigation, this is the first time they have made an application for continuance, or any kind of delay, and that, should this cause be continued, they expect to proceed to trial at the next term of this Court. They further state that this application is not made for delay, but for the purpose of properly presenting this case to this Court, that justice may be done.

WHEREFORE, They pray, in consideration of the premises, that a continuance of this cause may be granted to the next term of this Court.

A. C. MATTHEWS,
HARRY HIGBEE,
Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1900

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS, } ss.
COUNTY OF PIKE,

MICHAEL W. O'BRIEN, et al, Executors, Etc.,
COMPLAINANTS AND PETITIONERS,
vs. } No. 241.
JOHN G. WHEELOCK, et al,
RESPONDENTS.

A. V. Wills, being duly sworn, on his oath says that he is one of the respondents in the above entitled cause. That he is the owner of lands located in the said Levee Drainage District, and that he has read the petition and motion for a continuance herein, and that the same is true to deponent's knowledge, information and belief, and deponent's knowledge is derived from the fact that he has been connected with the said Levee Drain-

age District and the lands located therein, and with all matters connected with this litigation, since the commencement and during the progress thereof.

A. V. WILLS.

Subscribed and sworn to before me, this 2nd day of April, A. D., 1901.

HELEN M. ADAMS,

[SEAL.] Notary Public.

MICHAEL W. O'BRIEN, et al, Executors, Etc.,
COMPLAINANTS AND PETITIONERS,
vs.
JOHN G. WHEELOCK, et al,
RESPONDENTS.
No. 241.

To GENERAL HENRY M. DUFFIELD, COUNSEL FOR PETITIONERS, IN THE SUPREME COURT OF THE UNITED STATES, IN THE ABOVE ENTITLED CAUSE:

SIR:

Take notice that a motion for a continuance in the above entitled cause, of which the foregoing is a true copy, will be filed in the office of the Supreme Court of the United States on Monday, the 8th day of April, A. D., 1901, by counsel for Respondents, at the opening of the Court on said day; on which day said motion will be called for hearing in said Court, or as soon thereafter as counsel can be heard.

A. C. MATTHEWS,
HARRY HIGBEE,
Counsel for Respondents.

Supreme Court of the United States.

No. 38.—October Term, 1901.

Michael W. O'Brien et al., Executors, Petitioners, vs. John G. Wheelock et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 24, 1902.]

This case is brought here by certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a decree of the Circuit Court of the United States for the Southern District of Illinois, 78 Fed. Rep. 673, affirmed by the Court of Appeals, 95 Fed. Rep. 883. The bill relates to certain proceedings under an act of the general assembly of the State of Illinois, approved April 24, 1871, entitled "An act to provide for the construction and protection of drains, ditches, levees and other works." The opinion of the Circuit Court of Appeals was delivered by Mr. Justice Harlan, presiding as Circuit Justice, and the case is therein stated thus:

"By the above act of the general assembly of Illinois, it was provided that whenever one or more owners or occupants of lands desired to construct 'a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter.' § 1.

"The act required notice by publication to be given of any petition filed under its provisions, and that: 'Such notice shall state when and in what court the petition is filed, the starting point, route and terminus of the proposed drain or drains, ditch or ditches, or levees, and if a levee or other work is intended to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition.' § 2.

"If the drain or drains, ditch or ditches, levee or other work proposed to be constructed, was to pass through or over, or be constructed upon, lands lying in different counties, the petition could be filed in the county court of either county. § 4.

"The court in which the petition was filed was empowered to determine all matters pertaining to the subject-matter of the petition.

"If it appeared that the proposed drain or drains, ditch or ditches, levee or other work, was necessary or would be useful for the drainage of

the lands for agricultural and sanitary purposes, the court was required to so find, and appoint three competent persons as commissioners to lay out and construct such proposed work. § 5.

"It was made the duty of the commissioners to examine the lands proposed to be drained, and those over or upon which the work was proposed to be constructed, and determine: '(1) Whether the starting point, route and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all respects proper or most feasible, and if not, what is or are so; (2) The probable cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor; (3) What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work; (4) What lands will be benefited by the construction of the proposed work, and whether the aggregate amounts of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding.' § 9.

"If the commissioners found and reported that the expense would more than equal the benefits, the proceedings were to be dismissed; if less, then they were to have plans, profiles, surveys, and specifications made, and report the same to the court. §§ 10, 11.

"The commissioners were not confined to the point of commencement, route, or terminus of the drains or ditches, or to the number, extent, or size of the same, or the location, plan, or extent of any levee or other work, as indicated in the petition. But they were directed to locate, design, lay out, and plan the same as they thought would drain the petitioner's land with the least drainage, and for the greatest benefit of all the lands to be affected thereby. All plans proposed by the commissioners could be changed by the court on the application by them or by any person interested. § 12.

"The act required due notice by publication to be given of any application to confirm the report, and the privilege was given to all persons interested to appear and contest its confirmation, or to ask any modification thereof. If no objections were made to the report, or if the objections made to it were not well taken, it was to be confirmed. If the court was of opinion that the report should be modified, it was given authority to make such modification as would be equitable. §§ 13, 14.

"If the report was confirmed, then the court was authorized to impanel a jury of twelve men competent to serve as jurors, who, being duly sworn, were required to assess damages and benefits according to law; or the court could direct that a jury be impaneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners could apply to any justice of the peace in the county, who should immediately, without the formality of any written application, proceed to summon and impanel a jury of six men competent to serve as jurors, who should be sworn in the same manner as was provided in case of a jury impaneled by the court in which the proceeding is pending, the justice to enter upon his docket a minute of such proceeding before him, and the names of the jurors. § 16.

"The duty of the jury was to examine the land to be affected by the proposed work; ascertain to the best of their ability and judgment the damages and benefits sustained by or accruing to the land affected by the

construction of the proposed work; make out an asssesment roll, in which should be set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as was most convenient, the number of acres in each tract, and, if damages were allowed, the amount of the same; and in case damages were allowed to, and benefits assessed against the same tract of land, the balance, if any, should be carried forward to a separate column for damages or benefits, as the case might be. § 17.

"In making the assessment the jury were required to award and assess damages and benefits in favor of and against each tract of land separately, in the proportion in which such tract of land would be damaged or benefited; and in no case should any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it would be benefited by the proposed work, according to the best judgment of the jury. § 18.

"The commissioners, or any person who made objection to the assessment, were given the right of appeal from the finding of the jury. If, upon such appeal, there were corrections of the assessment, or if the assessment roll was confirmed, then the roll was to be spread upon the record, with right of appeal or writ of error therefrom. §§ 24, 26.

"At the time of confirming the assessment the court could order the assessment of benefits to be paid in instalments of such amounts and at such times as would be convenient for the accomplishment of the proposed work; otherwise, the whole amount should be payable immediately upon the confirmation, and should be 'a lien upon the lands assessed until paid.' § 27.

"It was made the duty of the clerk, immediately after the entry of the order of confirmation, to make out and certify to the commissioners a copy of the assessment roll, and also to make out and deliver to the commissioners separate copies of the same, pertaining to the lands situated in different counties, to be recorded in the recorder's office of the respective counties in which the lands were situated, and which should be notice of the lien thereon to all persons. § 28.

"Upon receiving a certified copy of such assessment, the commissioners could proceed to collect the same, or any instalment thereof, or certify the assessment of any instalment thereof which they might be entitled to collect at the time to the county clerk of the county in which the lands assessed were situated, who was required to 'extend the same, in a separate column, upon the proper tax books for the collection of State and county taxes: Provided, the owner, agent or occupant of any land through or on which any drain, ditch or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the value thereof upon his assessment.' § 29.

"In case the assessment for benefits should be payable in instalments, such instalments were to draw interest at the rate of ten per centum per annum from the time they became payable till they were paid, and the interest could be collected and enforced as part of the assessment. § 30.

"Other sections of the act are as follows:

'§ 31. When the commissioners shall have elected to collect any assessment or instalment thereof themselves, or shall not have caused the same

to be extended upon the State and county tax books, and any assessment or instalment shall be due and uncollected, and as often as any instalment shall become due and be uncollected at the time for making return of the tax books for the collection of State and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any instalment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of State and county taxes in the counties or respective counties where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amounts so collected to the commissioners.'

'§ 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee or other work for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and side drains, and may employ all necessary agents and servants, and enter into all necessary contracts, and sue and be sued.

'§ 35. The commissioners may borrow money, not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment on account of which the money is borrowed shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof.'

'§ 37. All damages over and above the benefits to any tract of land shall be payable out of all the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same.'

'§ 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy or in any manner impair the usefulness of any drain, ditch or other work constructed under this chapter, or that may have been heretofore constructed, for the purposes of drainage or protection against overflow, may be fined in any sum not exceeding two hundred dollars, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the State of Illi-

nois, and all fines when collected shall be paid over to the proper commissioners, to be used for the work so injured.

'§ 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying or impairing the usefulness of any such drain, ditch, levee or other work, shall be liable to the commissioners having charge thereof for all damages occasioned to such work, and to the owners and occupants of lands for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction.' Laws of Ill. 1871–2, pp. 356–365.

"Proceeding under the above act, numerous owners and occupants of the lands known at the time as the 'Mississippi bottom lands,' in the counties of Adams, Pike, and Calhoun, Illinois, filed a petition in the county court of Pike County, expressing their desire to construct drains and ditches, and also a levee and other works, across the lands of others in that bottom, for agricultural and sanitary purposes, so as to reclaim the bottom land from overflow by the waters of that river, 'in order to make the location salubrious, and render the soil available for tillage and otherwise develop the agricultural resources of said bottom land.' They represented that 'said bottom land has been from time immemorial, and now is, a low and nearly level tract of land formed by deposits of alluvion from said river; that it is traversed throughout nearly its entire length by a slough or bayou known as 'the Sny Cartee slough;' that said bottom land is also variously intersected by other and smaller sloughs, some of which are short channels putting out from the river and returning thereto, while others start from and return to the said Sny Cartee slough, and others are, again, lateral branches connecting said Sny Cartee slough with the river; that the said bottom land is below the level of the high water mark of said river, and absolutely without protection therefrom; that the greater part thereof is nearly every year inundated by the waters of said river, and all are subject to inundation, and have been repeatedly submerged by said overflow, the river on such occasions being a stream from about four to eight miles wide, and running from bluff to bluff on either side;' 'that, by reason of said exposure to overflow, the mass of the said bottom land has been allowed to remain in its primitive condition, and will so remain unless reclaimed; that it is but sparsely populated, and that the occupants thereof support themselves almost exclusively by the cultivation of the soil; that they are every year greatly embarrassed in putting in their crops by the peculiar character of the rise in said river, which has no regular time for reaching its maximum height, nor any fixed number of rises during a season; that their crops when planted are frequently destroyed by an unexpected rise in said river, and in such cases they are either compelled to replant their crops, or the crops are destroyed so late in the year as to render the operations of the season a total failure;' 'that upon the subsiding of the waters the said bottom land is left in a wet and marshy condition, so that the stagnant water is left on various parts of its surface, and the succeeding heat of summer and autumn evolve therefrom malaria and disease;' 'that by reason of said facts said bottom land not only now remains sparsely populated, while the territory around it is thickly settled, but the same is practically incapable of supporting any further population, so that the average taxable value of the lands now subject to overflow is

no more than about fifty cents per acre, and the present occupants of said bottom lands have been in most cases induced to remain solely by the prospect of the ultimate reclamation of said land, a consummation which has been the theme of their enterprise and endeavor ever since the settlement of the bottom land described.'

"The petitioners called the attention of the court to the act of 1871, and asked the appointment of commissioners, in accordance with the provisions of that law, 'for the purpose of constructing a levee on the Mississippi River, from a point on said river at or near the head of the Sny Cartee, in the county of Adams and State of Illinois, and thence in a southerly direction along or near the east bank of the Mississippi River, as shall be deemed advisable for the safety of the proposed work, to a point at or near the mouth of Hamburg Bay, in the county of Calhoun, State of Illinois, and to do and perform any and all acts, as provided in said law, for the surveying, laying out, and constructing, altering, repairing, enlarging, protecting, and maintaining, said proposed levee, or to render it efficient for the protection and reclamation of the lands lying east of the said levee, and between it and the bluffs, and now subject to overflow by the Mississippi River and other streams.'

"After asking a confirmation of the report of the commissioners, if they found and reported that the proposed levee could be constructed at a cost not exceeding $5 per acre for all lands benefited and reclaimed from overflow, the petitioners prayed: 'That the assessment for benefits upon the property to be affected by the construction of said work shall be paid in ten equal annual instalments, the first instalment being due and payable three years after the date of the commissioners' report and the filings of the plans and specifications with the court, and one-tenth of such assessment, with accrued and accruing interest, each year thereafter, until the whole amount shall have been paid.'

"The county court of Pike County having found that the proposed work was necessary, appointed in 1871, William Dustin, George W. Jones and John G. Wheelock commissioners, and they duly qualified and acted in that capacity. In the same year the commissioners reported the result of their examination, and in their report indicated, by map and profiles, the work to be done. The report was confirmed without objection, and a jury of twelve was organized to assess damages and benefits, and make an assessment roll. The assessments were made and put upon the record of the court. Certified copies of the assessments were recorded in Pike, Adams, and Calhoun Counties. An order was made requiring the assessments to be paid in ten annual instalments, with interest from October, 1872.

"In conformity with the order of the court, the commissioners issued bonds from time to time, upon estimates made by the engineer as the work progressed, to be used in the construction and completion of the work. They were delivered directly to the contractors as they were earned. The first issue of bonds amounted to $499,500, of which Francis Palms purchased $202,500. A second issue was made, amounting to $148,500, which were also purchased by him. That issue was the result of a second petition under the act of 1871, proceedings under which resulted in further assessments.

"It may be here stated that by an act of the general assembly of Illinois, approved April 9, 1872, it was provided that whenever it appeared

by the findings of the court before which proceedings were pending or might be had, under the act of April 24, 1871, that any drain, ditch, levee, or other work authorized by that act to be made would be of public benefit for the promotion of the public health, or in reclaiming or draining lands, the same should be deemed 'a public work;' and that it should be lawful for the commissioners appointed under the act of 1871 to register at the office of the auditor of public accounts any bonds issued by them under order of court; such registration to show the date, amount, number, maturity, and rate of interest of the bonds, and the fact of such registration to be certified by the auditor, under his seal of office, upon each bond. The act contained other provisions, but it is not necessary to refer to them.

"All of the bonds issued by the commissioners were in the same form. We give here a copy of one of them, issued in 1872:

'No. 6. United States of America. $500.
Sny Island Levee Bond.
State of (Ten per cent interest bond.) Illinois.

'The commissioners appointed by the county court of Pike County and State of Illinois, on the petition of John Morris and others, to locate and construct a levee on the Mississippi River, in the counties of Adams, Pike, and Calhoun, by virtue of an act of the general assembly of the State of Illinois entitled "An act to provide for the construction and protection of drains, ditches, levees and other works," and by power vested in them by said act, acknowledge themselves, as such commissioners, held and firmly bound unto John G. Wheelock or bearer in the sum of five hundred dollars, lawful money of the United States, payable in the city of New York, at the bank or agency used by the treasurer of the State of Illinois, on the first day of October, A. D. 1882, with interest at the rate of ten per cent per annum, interest payable on the first day of July in each year, on the surrender of annexed coupons as severally due.

'This bond is one of a series of five hundred thousand dollars issued for the purpose aforesaid, and after an order of the county court of Pike County aforesaid approving of the assessment made by a jury of the cost of said levee.

'In witness whereof, the said commissioners,' etc.

"Annual interest coupons, payable to bearer, were attached to each bond.

"On each bond was endorsed a certificate in these words:

'Auditor's Office, Illinois.
Springfield, Nov. 12th, 1872.

'I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same," approved April 9th, 1872, and in force July 1st, 1872.

'In testimony whereof,' etc.

"At the January term, 1876, of the Supreme Court of Illinois, the case of *Updike* v. *Wright*, 81 Ill. 49, was decided. That case involved, among other questions, the constitutionality of the above act of April 24, 1871, providing for the construction and protection of drains, ditches, levees, and other works. The case related to certain proceedings taken for the con-

struction of a levee on the banks of the Wabash River, The representation to the county court was that the lands of the petitioners were subject to overflow from that river, that their fences and crops were liable to be swept away and destroyed by such overflow, and that the same could be prevented by an earthwork levee.

"After observing that the above act of 1871 was evidently passed in view of article 4, section 31, of the Illinois Constitution of 1870, declaring that 'the general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others,' Chief Justice Scott, delivering the unanimous judgment of the court, said: 'Apparently, an effort was made to have the law enacted conform to the constitutional provisions in every particular. Hence it is declared the work to be done is the construction of drains and ditches for agricultural and sanitary purposes, and if it becomes necessary, in the construction of a system of drainage, that a "levee or other work" be adopted to make that system available, such levee or other work may be constructed under the provisions of the statute. But it is nowhere intimated the owners or occupants of land may undertake, under the provisions of this law, the building and maintenance of an immense levee on the borders of a river, not connected with any system of drainage by ditches. Neither the constitution nor the statute contemplates any such work. What was in the minds of the framers of the constitution, and the legislators who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of a "levee or other work" is always in connection with a system of drainage in that mode. The work outlined by the constitution and the statute is comparatively insignificant, and may be done at no great cost; but that which is undertaken in this case is the construction of a levee on the banks of the Wabash River, of many miles in length, and estimated to cost a great many thousands of dollars. No system of drainage by drains and ditches was planned, nor deemed necessary for agricultural and sanitary purposes. The representation to the county court is, the lands of the petitioners are subject to overflow from the Wabash River; that their fences and crops are liable to be swept away and destroyed by such overflow; and that the same can be prevented by an earthwork levee. The undertaking is one of great magnitude, and will require the expenditure of large sums of money. The assessment on complainant's land is over $10,000. And the allegation in the bill is that, unless all further assessments proposed to be made be arrested, the levee will cost more than the land is worth. Any construction of the statute that would warrant the owners or occupants of lands to enter upon such an immense and costly work seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes that "levees or other works" may be undertaken, as auxiliary to the drainage of the lands. Our opinion is, this is the only construction the statute will bear, consistently with the constitution; otherwise, one owner, whose lands are subject to overflow at certain seasons of the year from a river, could set in motion the proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of others in the vicinity which commissioners appointed by the court might deem benefited by the improvement. Such a work cannot be said to be drain-

ing lands by drains and ditches over the lands of others; nor is such a levee, in any just sense, in the language of the statute, "necessary to the drainage of the lands." The work of constructing a great levee along the banks of a river subject to overflow, which defendants are about to do, is not embraced within the provisions of the statute, and is therefore without authority of enabling law.'

"But the court proceeded to observe that the decision could be placed on the ground that the general assembly possessed no power under the constitution to vest commissioners or juries selected, or the county court, with authority to assess and collect taxes or special assessments for the contemplated improvement. It said: 'Section 5, article 9, of the constitution of 1848, which declared "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same," was always construed by the decisions of this court as a limitation upon the power of the general assembly to grant the right to assess and collect taxes to any other than the corporate or local authorities of the municipalities or districts to be taxed. *Board of Directors* v. *Houston*, 71 Ill. 318; *Harward* v. *The St. Clair and Monroe Levee and Drainage Co.*, 51 Ill. 130; *South Park Commissioners* v. *Salomon*, 51 Ill. 37; *Gage* v. *Graham*, 57 Ill. 144; *Hessler* v. *Drainage Commissioners*, 53 Ill. 105. It was also held that the power in the legislature was subject to the further limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the taxpayers to be affected. That section of the constitution of 1870, upon this subject, provides: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The clause in the present constitution, like that in the constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns, and villages with power to make local improvements by special assessments or special taxation upon contiguous property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns, and villages are within the constitutional provisions; and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same. With equal propriety, this clause of the present constitution must be regarded as restricting the general assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the legislature possesses plenary power, unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments or taxes for every conceivable purpose. As we have seen, only cities, towns, and villages may levy special assessments or special taxation for local improve-

ments, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition such taxes shall be uniform in respect to persons and property. It would seem, therefore, to follow, as a corollary from the propositions stated, that neither the commissioners or the juries selected, nor the county court, is such a body as, under the constitution, may be given power to make local improvements by special assessments or by special taxation upon contiguous property. There is still another consideration that has an important bearing upon the decision of the case. The clause of the constitution we have been considering, like that in the constitution of 1848, must be understood, in the light of the decisions of this court, as forbidding the general assembly from imposing a burden by taxation upon any locality, without the consent of the citizens affected. Under this law, the people whose property is subject to taxation or assessments have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court. No opportunity was afforded them to do so, nor does the law make any provision for submitting the question to a vote, to ascertain the will of those whose property is subjected to this local burden. It is imposed upon them under the statute, by the decision of the county court. Obviously, that section of the constitution that declares "the general assembly may pass laws permitting the owners or occupants of lands to construct drains or ditches, for agricultural and sanitary purposes," implies that the community whose property is to be taxed may have the right of election in the matter. Otherwise, an onerous burden may be imposed upon them, without their consent, and such proceedings might be had as would result in the deprivation of property. How can the land owners be permitted to construct drains and ditches, unless some election is guaranteed to them? The language employed implies voluntary action. Illustration will make the inconsistency of the present law apparent. For example, the privilege is given to any occupant, as well as the owner of land, of presenting a petition to the county court. Should the construction contended for prevail, a tenant residing upon land adjacent to a river subject to overflow might present a petition, and, under the decision of the court, the work of erecting a levee miles in length, and costing large sums of money, might be entered upon, and the expenses assessed upon the property in proximity to the river that might in any degree be deemed benefited. An intention to confer such unwarranted power upon one man, who would himself be subject to none of the burdens imposed, ought not to be imputed to the legislature. Any laws not permitting an election as to the propriety of undertaking the work are vicious, and within the inhibition of the constitution. It does not militate against this construction that the land owner may appear before the county court when the petition is presented, and resist the application, or may contest the assessment upon his property when made. Whether the contemplated work shall be undertaken, and his property subjected to taxation, is not made to depend upon his election, but upon the decision of the court. It would be a solecism to call that privilege an election.'

"At the same term of the court, the case of *Webster* v. *The People* (unreported) was decided. That case related to the above work undertaken under the authority of the county court of Pike County. The efforts of the commissioners to collect instalments of interest on the assessments were resisted by certain land owners. The Supreme Court of Illinois said:

'The principal questions raised and discussed in this case are the same as in *Updike et al.* v. *Wright*, decided at the present term, and for an expression of our views reference is made to the opinion in that case. For the reasons there given, the judgment in this case will be reversed, and the cause remanded.'

"It may be well to state in this connection that the Supreme Court of the United States, in *Harter* v. *Kernochan*, 103 U. S. 562, 570, referring to section 5, article 9, of the Illinois constitution, declaring that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, has said: 'It is the settled law of the State, as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised, and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns, and villages, or for any other than corporate purposes. *County of Livingston* v. *Darlington*, 101 U. S. 411.' *Weightman* v. *Clarke*, 103 U. S. 256, 259.

"After the above decision in *Webster* v. *The People*, certain land owners undertook to provide for the protection of their lands from overflow by the execution of deeds of trust to the commissioners. Under these deeds as much, perhaps, as $30,000 was raised and expended by the commissioners.

"In May, 1878, while those deeds were in force, Palms, on behalf of himself and others instituted a suit in equity in the Circuit Court of the United States for the Southern District of Illinois against the levee commissioners. The bill in that case recited the above legislation, and the proceedings resulting in the appointment of the commissioners, the assessments by the jury, and the issuing of bonds by the commissioners, and charged that the expense of the work was paid by the commissioners with money furnished by Palms and others, of which, it was alleged, the owners and occupants of the lands benefited and assessed were at the time well aware. Referring to the twenty-ninth section of the act of 1871, prescribing the dutes of the commissioners, and also to the above act of 1872, that bill alleged that the commissioners made efforts 'to collect the amount of some of the instalments of said assessments, and the interest thereon, but the courts of the State of Illinois, before whom the question of the collection of such assessments and the instalments thereof under said statutes was brought, refused to give effect to the provisions of said acts, so far as they purported to authorize the collection of the same by the collectors of taxes under extensions on the tax books; and no means are left for the collection of such assessments and interest, except such as may be supplied by the general authority of the courts that have jurisdiction of such questions. And your orator would further show unto your honors: That the whole amount of the moneys advanced by him, and by other purchasers of the bonds, with interest thereon, remains unpaid, and that said commissioners remain and continue in the actual use and possession of the said levee and other works constructed with the moneys borrowed of your orator and others, by the said commissioners, under the proceedings aforesaid; and they do also, by and under the direction of the owners of said lands, keep and use the said works to protect their own lands, and the lands of the other owners and occupants, from overflow from said river. And your orator further shows unto your honors: That the said commissioners refuse to pay to your

orator and the other holders of said bonds, the whole or any portion of their principal—money loaned to them for the purposes aforesaid, or interest, and they also refuse to enforce the collection of said assessments on the several tracts of land described in said Exhibit A, or the interest thereon, as it is their duty to do, and the owners and occupants of said lands refuse to pay said assessments, or the interest thereon, so that the moneys loaned by your orator for the construction of said works is wholly lost, together with the interest thereon. And your orator would further show unto your honors: That the owners and occupants of said lands are very numerous, as will appear by the lists of land and the names of the owners thereof, as stated and set forth in the said Exhibit A, and the names of many of them are unknown to your orator, but all of them reside in other of the States of the United States than the State of Michigan; the greater number of them are residents and citizens of the States of Illinois and Missouri; and that the said Commissioners, John G. Wheelock, George W. Jones, and Benjamin F. Westlake are citizens of the State of Illinois, and of the Southern District aforesaid.'

"The relief asked was a decree directing an account to be taken of 'the moneys loaned and advanced' by Palms to the commissioners, 'to be used by them in the purchase and acquisition of the lands required for the location and construction of the said levee and other works, and for the construction and the completion of the said levee and all the works and improvements connected therewith, together with interest thereon at the rate of ten per cent per annum, according to the terms of said bonds and the coupons thereto attached;' the amount due Palms being ascertained, then that such amount be adjudged a lien in favor of Palms 'upon the said levee and other works, and the lands acquired, owned, and held by the said commissioners for the site of said levee, and all other improvements, and upon the said assessments upon all of the said lands described in the said Exhibit A, for the benefits to said lands afforded by the said levee and other works, and the interest thereon;' and that 'the said commissioners proceed at once, under the order and direction of your honors, to collect such assessments upon all and every of said tracts of land and the interest that has, or that may hereafter, accrue thereon, or so much thereof, from time to time, as will be sufficient to pay the interest money or the principal, payable to your orators as the same falls due; or that it may please your honors to appoint one or more competent persons, as receiver or receivers, to take possession and charge of the said levee and other works, and manage and control the same, together with all the books, papers, and properties of said commissioners, and with authority to collect, under the order and direction of this honorable court, the said assessments and interest thereon, as often and in such sums as may be sufficient to meet and satisfy the claims of your orators as aforesaid.'

"The commissioners answered in that case, insisting, among other things, that the bonds in question having been registered with the auditor of public accounts under the act of 1872, they were not responsible for the failure to collect the money to pay interest, and were without any duty in respect to the said assessments. They referred to the fact that certain land owners had at all times opposed the proceedings instituted to assess their lands for benefits on account of the said levee, and refused to pay interest on assessments, in consequence whereof the township collector had returned nearly all the land owners involved in the proceedings as delin-

quents; that thereupon the county collector made application to the Pike County court to enforce said assessments against the delinquent lands; that some of the land owners opposing the assessments filed objections to judgment for such assessments, setting up that the law under which the assessments were imposed was unconstitutional; that the commissioners employed counsel to prosecute the application for judgment and for the collection of said assessments, and the county court gave judgment against the lands; that the land owners appealed to the circuit court, which affirmed the judgment of the county court; that thereupon the land owners carried the case by appeal to the Supreme Court of the State, stipulating that one appeal should be decisive of all the assessments; that the commissioners themselves employed counsel in the argument of the case in the Supreme Court of the State, and said court decided adversely to the right to collect said assessments; and that such decision of the highest court of the State was decisive of any question of right on their part to enforce assessments. The case referred to by the commissioners in their answer was the above case of *Webster* v. *People*. The commissioners also averred that 'as such commissioners they are not now, and never have been, in any actual possession of any part of said levee or other work, except for the purpose of constructing, maintaining, and repairing the same; that they have never had title to any portion of the said levee, as they are likewise advised and believe on account of the unconstitutionality of the law under which said work was done; and that since said law was declared unconstitutional these respondents, as commissioners, have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair.'

"On the 13th day of March, 1879, that cause was heard upon bill and answer in the Circuit Court of the United States. By that court it was adjudged and decreed 'that the said defendants [the commissioners] take, retain, and hold the right of way, levee, and other works and property in question, and described in the pleadings, and keep, take care of, preserve, and protect the same, under the order and control of this court, for the benefit and on behalf of the complainant and all other parties interested therein, or who may hereafter be found to be interested in the same, in whole or in part.'

"It was further decreed 'that the complainants and all other persons who may have loaned or advanced money to the defendants for the acquisition by those of the said right of way, or for the construction of the said levee and other works and property connected therewith, or who may be the holder of any of the bonds issued by said defendants to raise money for the purposes aforesaid, or to pay for such right of way or the construction of such levee and other works, or to pay any of the proper expenses connected therewith, who may come into this suit, contributing their proper proportion to the expenses thereof, have liberty to go before the master and produce these said bonds and coupons for interest thereon, and make proof of the amount due them of principal and interest on account of such loans, advances, and bonds; and the cause is referred to John A. Jones, master in chancery, for the purposes aforesaid, who will, upon the application of the complainants, or other persons who may come into the cause as complainants upon the terms hereinbefore prescribed,

and reasonable notice to the defendants or their solicitors, proceed to take the proofs of the amounts due to the complainants, and allow parties who may have before that time come into the cause, and, after such proofs are taken, make a report to the court of the amounts found by him to be due each and any party who may appear before him, and the ground, and facts of his several findings and conclusion;' and 'that after the coming in of the master's report of the amount or amounts found by him to be due to the complainant or other persons who may come into the cause as aforesaid, and the approval of said report, and the determination and adjustment by the court of the amount or amounts due to the complainant or other persons who may come into the cause for moneys advanced or loaned on bonds held as aforesaid, the said complainants or other persons have the liberty to exhibit and file their supplemental bill or bills against any or all the present or former owners of the said lands alleged in said bill to be benefited by the said levee and other works, or who have heretofore or who may now be in any way interested in the said levee and other works, or the lands benefited thereby, to compel them to contribute to the payment of the amount or amounts which may be found due to the said complainant or other persons as aforesaid, and for such other and further relief as they may be advised they are entitled to; and the court reserves all other questions of relief to the parties, and of the costs, to be considered hereafter. And the said complainant is at liberty to use the names of the defendants in any such proceeding by way of supplemental bill, if they are advised it is necessary to do so, upon rendering them a sufficient indemnity against all costs and expenses.'

"The master to whom the cause was referred to ascertain the amount of the several bonds and coupons made his report, showing the names of various persons, and the amount of bonds held by them, respectively. The amount reported as due to Francis Palms on the bonds held by him was $221,228.26. The total amount found due to him and certain parties who became co-plaintiffs with him in the cause was $304,908.26. In the decree confirming the master's report it was declared: 'And it is further ordered, adjudged, and decreed by the court that the said several sums of money so found to be due to the said complainants as aforesaid are a lien upon the assessments made under the order of the county court of Pike County, in the State of Illinois, upon the lands described in the bound book, Exhibit 'A' with complainants' bill, and upon the said lands, as provided in the twenty-seventh and thirty-seventh sections of an act of the general assembly of the State of Illinois entitled 'An act to provide for the construction and protection of drains, ditches, levees and other works,' approved April 24, 1871. And it further appearing to the court that the defendants, commissioners under the several orders of the county court of Pike County, aforesaid, have no money in their hands for the payment of the amounts so found and adjudged to be due to the said several complainants, and it also appearing to the court from the allegations of the complainants' bill, and not denied by the said defendants in their answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the court that the complainants have the right and liberty to proceed in this court, in the name of the said defendants as complainants as such commissioners, or in their own names as complainants, against the lands described in the said

Exhibit 'A,' and the owners thereof, or such of such lands and the owners thereof, or other persons, and said commissioners, as they may be advised, are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original, supplemental, or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit.'

"It should be here stated that after the decision in *Webster* v. *People*, and after the institution by Palms of the suit in the Circuit Court of the United States, the following amendment to the constitution of Illinois was adopted: 'The general assembly of Illinois may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authority thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by a special assessment upon the property benefited thereby.' 1 Starr & Curtis' Anno. Stat. Ill. p. 122.

"Subsequently the legislature of Illinois passed an act which took effect May 29, 1879, entitled 'An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts.' 1 Starr & Curtis' Anno. Stat. Ill. p. 919.

"Some of the defendants in the present case made efforts to secure the passage of the act last referred to. That act provided for the formation of drainage districts with authority not only to construct drains, ditches, and levees for agricultural, sanitary, and mining purposes, but also to maintain and keep in repair any such drains, ditches or levees 'heretofore constructed under any law of this State;" and, in cases where a levee had been theretofore built 'under any law of this State,' the annual assessment for keeping the same in repair was made due and payable on the first of September annually.

"Subsequently, on the 26th of January, 1880, some of the land owners whose lands were described and included in the original assessments and in the original bill filed by Palms instituted proceedings under the act of 1879. In their petition they described the route and terminus of the levee, alleging that the levee 'was constructed, under the laws of Illinois then in force, in the counties of Adams, Pike, and Calhoun, for the years 1872, 1873, and 1874.' They further alleged that, by proper repair and maintenance of the levee, the lands aforesaid (which are alleged to be part of the lands described in the original bill and in the present bill, amounting in the aggregate to about 90,000 acres) would be reclaimed and brought into cultivation; that, in addition, it would greatly improve the sanitary condition of the locality through which the levee passed; and that it was absolutely necessary for the health and proper drainage and protection of the said land that the levee be repaired as speedily as possible. They prayed that a drainage district, to be known as 'Sny Island Levee Drainage District,' be formed out of the lands subject to periodical overflow by the Mississippi River in the townships named, for the repair and maintenance of such levee, according to the statute; that commissioners be appointed under the act of 1879, with directions to do all acts provided in the law for repairing levees, ditches, and drains, through assessments to be ordered; and for other and further relief.

"Such proceedings were had that the county court of Pike County duly created the Sny Island Drainage District, and in 1880 it received the surrender of the levee from the original Sny Levee Commissioners, and now retains possession and control of the same.

"Palms died on the 24th day of November, 1886, more than six years after the last order made in the suit brought by him in the Federal court.

"The present suit was brought by his executors; the defendants herein being the surviving Commissioners, Wheelock and Jones, and numerous individuals who own lands within the territory described in the proceedings instituted in the county court of Pike County under the act of 1871.

"The bill proceeded upon the general ground that each tract of land in question was chargeable in equity with the amounts assessed against it under the act of 1871, with interest, and that the plaintiffs had a lien on each tract for such sums as had fallen due and might become due under such assessments. It alleged that each defendant owned or claimed one or more tracts (Exhibit 'A' showing a description of the various tracts, and the names of the persons against whom the assessments were made); that each defendant who acquired title to any of the lands after the assessments of 1872 and 1873 did so with full knowledge of such assessments and the above issue of bonds, as well as of the fact that the plaintiffs had purchased the bonds, and that the levee was constructed with the proceeds thereof; that, with like notice and knowledge, each of the defendants had appropriated and used the levee for the protection of their lands, and continued so to do; that all the defendants named in Exhibit 'A' participated in causing said bonds to be issued and sold, and the proceeds expended by actively soliciting the passage of the act of 1871; that before and at the passage of the act of 1871 the reclamation and protection of the lands described in that exhibit had been a subject of consideration and discussion amongst the owners and occupants of the same, as well as others, and it was understood by all parties interested in such lands that in order to reclaim and protect the same a statute was absolutely necessary, under the provisions of which the persons interested in the lands could be united and organized, and a common agency created, with authority to make all necessary plans, estimates, and contracts for the location of the levee, and to borrow money upon bonds or otherwise, to be secured by assessments or pledges of the lands benefited; that the defendants, through the agency of their co-defendant Charles M. Clark, had procured the passage of that statute, and caused its provisions to be made known to the people interested, and thereupon devised a plan for the organization of a corporation composed of persons interested in the lands, for the purpose of raising money to put the act into effect; that a large number of the defendants subscribed to the capital of that corporation in order to effect the objects of its creation; that the other defendants purchased lands through such last-named land owners, with full notice of the equities of the plaintiffs; that all of the defendants who purchased after May 4, 1878, did so with full notice of said assessments, and that the same were unpaid, and also that said original suit in the Federal court was pending; that certain other defendants participated in causing the said bonds to be issued and sold to the plaintiffs' testator, and the proceeds thereof to be expended in the construction of the levee, and in causing the said assessments to be made by signing the original petition to the Pike County court in the year 1872; that certain other defendants purchased lands from other land owners who had joined in the petition, with full knowledge of what had previously taken

place; that other defendants participated in procuring the bonds to be sold, and the proceeds to be expended as stated, and in causing said assessments, by signing on the 20th day of November, 1874, a petition for a second assessment under the act of 1871; and that other defendants purchased from or through persons of the class last mentioned, with full knowledge of all the facts.

"The plaintiffs also alleged that certain named defendants, after the above decision by the Supreme Court of Illinois, knowing the levee to be constructed with the plaintiffs' money, and having full notice of all the facts, executed to Jones, Wheelock, and Westlake deeds of trusts; that said deeds were made for the purpose of defeating the claims of the plaintiffs, and it was stipulated between the trustees and the last named defendants that no part of the funds collected by the former should ever be applied to the payment of any indebtedness created by or on account of the original levee; that said deeds of trust continued in force until 1887, when the same were canceled, said Jones, Wheelock, and Westlake having, it is alleged, devised another scheme for defeating the claim of the plaintiffs; and that certain other defendants purchased from defendants of the class last mentioned, with full notice of all the facts.

"It was further alleged that after the decree of March 13, 1879, namely, on January 26, 1880, certain defendants named filed a petition in the county court of Pike County setting forth that they owned certain lands, and alleging that a certain levee (the one heretofore described) had been constructed under the laws of the State of Illinois; that said petition set forth the purposes for which the levee had been constructed; that the same was in bad repair; that, in the faith that the same would be properly constructed and repaired, they had expended large sums of money, had improved farms, and that all such improvements would be washed away, unless the levee should be repaired and kept up; and that the lands subject to overflow amounted to an aggregate of 90,000 acres. The bill set forth the substance of the petition, and the various steps taken, as already stated, for the formation of a new drainage district, to be known as the 'Sny Island Levee Drainage District,' and alleged that all the defendants so joining had full notice of all the facts and of the making of the assessments aforesaid; that certain other defendants purchased lands from the defendants of the class last mentioned, with notice of all the facts; that certain other named defendants, pursuant to the statute of Illinois approved May 29, 1879, were severally made parties to, and had notice of, all the proceedings for the organization of the Sny Island Levee Drainage District, as well as of the contents of the petition therefor, and were bound by such proceedings and the appropriation of the levee aforesaid; that certain other named defendants acquired title to said lands, or interests therein, after July 26, 1880, and were bound by said proceedings and the appropriation of said levee; that certain other defendants named were heirs at law and took title to portions of said lands from ancestors who took part in some or all of the aforesaid proceedings; that certain other defendants had aquired title to some of said lands by accepting deeds of conveyance expressly recognizing the lien of plaintiffs on said tracts; and that every one of the present defendants had full notice of the claims of plaintiffs and of the facts aforesaid; and that all of the defendants now appropriated said levee and other works and refuse to contribute anything to the payment of the plaintiffs.

"The bill alleged that the Sny Island Levee Drainage District had every year made large assessments, and, contriving and intending to defeat the plaintiffs, had caused many of the tracts of land to be sold for non-payment of such assessments (such sales, it was alleged, being merely colorable, as against the rights of the plaintiffs, and mere clouds on the title to said land); that before the construction of said levee the lands were wet, and not worth exceeding fifty cents per acre; that the average amount assessed against the lands for the cost of the levee was greatly in excess of the then value of the lands, but it was expected that the work would, when constructed, drain every tract, and so enhance the value of the same as to make the lands ample security for the money borrowed; that the plaintiffs, relying on this and on the assurances of the land owners and commissioners, purchased the bonds in question; and that the lands were enhanced in value by said expenditures until they became worth $25 per acre.

"It was also alleged that, if the levee had been kept up, it would have afforded full protection, and would have caused the lands to have continued to be good security; that defendants had spent some money in repairing said work, but made such improvements and repairs so unskilfully that they were insufficient; and that by neglect of defendants the lands had again become wet and overflowed, and were not now good security for the plaintiffs.

"After stating that the defendants were, by reason of the matters and things set forth in the bill, bound to preserve, protect, improve, and repair the said levee and other works described, by sufficient contribution in money, ratably or otherwise, and by further assessments upon the lands, in order to protect and keep the security of the plaintiffs adequate and sufficient, the plaintiffs prayed that by the appointment of a receiver with ample powers, and by other appropriate order, the defendants should be compelled to preserve, protect, repair, improve, and make said levee and other works protective of said lands, 'or to give and confer upon such receiver the power to make needful assessments upon said lands in proportion to benefits and the relative value of each tract thereof, and with the money arising therefrom, or by the mortgage of such assessments and the lands upon which they are made, raise the money necessary for the repair and improvement of the said levee and other works, and with the money so raised proceed to repair and improve said levee until it is made adequate for the drainage and protection of all of the said lands; that each and every of said defendants herein may be enjoined by this honorable court from selling, transferring, or assigning the title to said lands owned by them, or any part thereof, upon which any of said assessments may rest, except subject to the lien of said assessments, as the same shall be determined by this honorable court, or in any manner whatsoever changing, altering, or affecting the title thereto so as to in anywise impair, diminish, hinder, or prejudice the lien of said assessments thereon, or on any portion thereof, and that the Sny Island Levee Drainage District, its officers and agents, be enjoined from selling or offering for sale any lands covered by any of the assessments herein in question, for any pretended assessments or alleged liens by said district attempted to be assessed, except subject to the lien of all assessments and liability on said lands, respectively, as the same shall be determined by this honorable court.'

"It was further asked in the bill that the court order, determine, and declare the amounts due to the plaintiffs and all other holders of bonds

and coupons who would come in and contribute to the expense of this suit, 'and the amount due for principal and interest on the several assessments made against and upon each tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon each tract of land necessary to the payment of the amount of the principal and interest now due upon the bonds and coupons of your orators and others who may come into the cause and contribute as before mentioned, and that each of the said tracts of land be sold under the order and decree of this court for the amount chargeable upon and against the same, unless the owner of the same, or some other person for him, shall, within a day limited, pay said amount, with a just proportion of the costs of this suit;' and also that the court would 'appoint one or more commissioners or receivers in the place and stead of the said John G. Wheelock and George W. Jones, or appoint a commissioner in the place of the said Benjamin F. Westlake, deceased; and, if one or more commissioners or a receiver or receivers are appointed in the place and stead of the said John G. Wheelock and George W. Jones, the said Wheelock and Jones may be ordered and directed to turn over and deliver to such commissioners or receivers so appointed all books, papers, documents, and property now in their possession or under their control.'

"The defendants demurred to the bill, and the demurrers were overruled. They subsequently filed answers, which put the plaintiffs upon proof of many essential allegations of their bill, without proof of which, independently of the question of law arising upon the face of the bill, no part of the relief asked could have been granted. In the view which is taken of the case by this court, it is unnecessary to extend this opinion by setting forth the averments and denials of the several answers.

"Upon final hearing the Circuit Court dismissed the bill."

Mr. Chief Justice FULLER delivered the opinion of the Court:

The Circuit Court held in substance, among other things, that the decretal order of that court on the bill first filed adjudging the amounts reported by the master to be due the several complainants and giving them liberty to file a supplemental bill against the owners of the lands benefited to compel them to contribute to the payments of the amounts thus reported, was not an adjudication which precluded the land owners from denying their liability; that as it was thirteen years after the act was declared to be unconstitutional and nine years after leave was given to file the supplemental bill, before any step was taken except as against those who were originally commissioners, there had been such laches as precluded complainants from having the relief sought, the conditions of the property and the relations of the parties having in the meantime greatly changed. The Circuit Court of Appeals held that even when exercising an independent judgment a Federal court should give effect to rules of construction previously established by the highest court of a State, and not act upon a different view unless compelled to do so to prevent an absolute denial of justice; that, applying the settled rule of construction of the State to the State consti-

tution relating to the subject, the act of April 24, 1871, was unconstitutional, and assessments made thereunder were not enforceable; that the fact alone that land owners advocated and used their influence to secure the passage of a law under which bonds were issued, to be paid by special assessments against their lands, which law was subsequently declared unconstitutional, and the assessments void, did not afford ground on which a court of equity should declare a lien on such lands in favor of the bondholders, in the absence of fraud, and where both the land owners and the purchasers of the bonds acted in the mistaken belief that the bonds were valid; and that where bonds issued by commissioners in payment for the construction of a levee to protect lands from overflow, were void, a court of equity had no power to determine that certain lands received the benefit of the expenditure, and on that ground to declare a lien thereon in favor of the bondholders. The decree of the Circuit Court was not affirmed on the ground of laches, but the Circuit Court of Appeals nevertheless said: "The plaintiffs can take nothing, as against the individual land owners, defendants in this cause, by reason of any order made in the suit instituted by Palms in the Circuit Court of the United States against the commissioners designated under the act of 1871; for the present defendant land owners were not parties to that suit, and could not be concluded by any order made in it. It is evident from the orders entered in that case that Judge Drummond did not intend to pass upon the rights of the land owners, but was of opinion that if Palms had any ground of action against them, in respect of the lands attempted to be specially assessed under the act of 1871, he must bring them before the court by supplemental bill. He was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889,—about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a court of equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate, because it is provided by statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the time it becomes a lien, except upon the revival of the same by *scire facias*, and that an action to recover real estate shall be barred by seven years' residence thereon under a title of record, &c.; by seven years' adverse possession under color of title and payment of taxes; or, as to unoccupied land, by seven years' payment of taxes under color of title. 2 Starr & C. Ann. Stat. Ill. p. 1386, c. 77, § 6; Id. pp. 1538, 1539, 1547, c. 83, §§ 4, 6, 7. In this case most of the defendants made proof of adverse possession. Besides,

as said in *Johnston* v. *Mining Company*, 148 U. S. 360, 370, 'the mere institution of a suit does not of itself relieve a person from the charge of laches,' and 'if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun.'"

The bill is stated by counsel to be a bill to "enforce severally against the lands of certain defendants the lien of separate assessments for the construction of the levee, with the proceeds of which the levee was built, upon the grounds, 1st, that such assessments were levied in strict conformity with the terms of the statute of 1871, which was a valid law; and, 2d, that even if that statute was unconstitutional, many of the defendants owning such lands are estopped to deny the constitutionality of said act and attack the assessments on that ground. It is not a bill to compel contributions to, or collect proportionate amounts of, a gross sum, but is a bill in the nature of a foreclosure bill to enforce, on the several and separate parcels of land, the liens of several and specific assessments upon the faith of which the moneys which built the levees were advanced."

It is insisted that it is not a bill to collect a tax, or a bill "to hold any municipal corporation or any individual liable, directly or indirectly, at law or in equity."

The bill purports to be an original bill in the nature of a supplemental bill, supplemental to the bill originally filed by Palms, either by way of enforcing the decretal order entered on that bill, treated as a final decree, or, treating that order as interlocutory merely, of obtaining a decree on the whole case as against new parties. Which view is taken is perhaps not material, for "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill." *Lawrence Manufacturing Company* v. *Janesville Mills*, 138 U. S. 561. And, moreover, the bill is an original bill as to the land owners.

Palms filed that bill, on behalf of himself and others similarly situated, May 4, 1878, against Wheelock, Jones and Westlake, as commissioners appointed under the act of April 24, 1871, praying that the moneys "loaned and advanced" by complainant to those commissioners be ascertained, and a decree entered that complainant was entitled to a lien on the levee, and other works and lands, acquired by the commissioners, and the assessments for benefits to said lands, which had been made; and further that the commissioners be decreed to proceed at once to collect the assessments, or so much thereof from time to time as would be sufficient to pay the interest and principal payable to complainant as the same fell due, or that the court appoint a receiver or receivers with authority to collect said assessments.

The commissioners were not impleaded as representing the land owners in the litigation. Their duties were such as the act of 1871 defined, if

that act were valid, and their powers were created and limited thereby, and did not include the power to bind all or any of the land owners of the district in such a suit. The suit was brought to compel the commissioners to discharge the duty, under the act, of enforcing the collection of assessments in the interest of the bondholders, as creditors, and in that sense, they occupied an adverse relation to the land owners who were *quasi* debtors.

The commissioners had filed in the county court of Pike County their assessment roll in 1872, and objections thereto by certain land owners having been decided adversely to them by the county court, and, on appeal, by the circuit court of the county, they took the case to the Supreme Court of the State, which decided that the act of 1871 was unconstitutional. This judgment was pronounced at January term 1876. It was after this that, interest being overdue on the bonds held by him, Mr. Palms filed his bill. Some other bondholders became parties complainant, and on March 13, 1879 an order was entered permitting complainants to bring the land owners into court and test the question of their liability, and the cause was referred to a master. July 7, 1880, the report of the master was confirmed and the court adjudged and decreed that there was due to Palms $221,228.66, and to various other complainants some thousands of dollars as specified, the whole aggregate sum found due complainants being $304,908.26, it being added: "The above amounts are found due without prejudice." It was further decreed that the sums of money found due were "a lien upon the assessments made under the order of the county court of Pike County, in the State of Illinois, upon the lands described in the bound book Exhibit A" as provided in the twenty-seventh and thirty-seventh sections of the act of April 24, 1871. The order proceeded that it appearing that the commissioners had no moneys in their hands for the payment of the amounts so found due, and that they had taken no steps for the collection of the assessments, it was further ordered by the court "that the complainants have the right and liberty to proceed in this court in the name of the said defendants as complainants and as such commissioners, or in their own names as complainants against the lands described in the said Exhibit A and the owners thereof, or such of such lands and the owners thereof, or other persons, and said commissioners as they may be advised are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original, supplemental or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid and also for the costs of this suit." Both these orders show that the Circuit Judge was of opinion that to subject the lands to the assessments in that suit the land owners must be made parties; and even the amounts found due were in terms so found without prejudice to their rights.

No steps were subsequently taken, and Mr. Palms died November 24, 1886. His executors, on April 22, 1889, filed the present bill against some thousand land owners of the district as well as Wheelock and Jones, two of the alleged levee commissioners, Westlake in the meantime having deceased.

It was an original bill as to these new parties and they were entitled to all the defenses which existed when it was filed, and were unaffected by the principle of *lis pendens*. The Supreme Court of Illinois had held in 1876 that the act of April 24, 1871, was in contravention of the constitution of the State and void. This decision was made after the bonds in question had been issued and purchased by Palms from the contractors, but the judgment was rendered on objections by the land owners to the confirmation of the assessments, the collection of which was relied on for the payment of the principal and interest of the bonds, so that it might well be held to be binding on the Federal courts. But we agree with the Circuit Court of Appeals that even if the Circuit Court was not obliged to accept that decision, yet that there was so little doubt of its correctness as to require the same conclusion. The rulings of the State Supreme Court were that the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, was not embraced within the act of 1871; that section 31 of article IV of the Constitution of 1870, that "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others," did not authorize the construction of a levee independent of drainage; that section 9 of article IX of that constitution was a limitation on the power of the Legislature, which could only vest such power in such municipalities and not in any other bodies, though other municipalities might be vested with jurisdiction to assess and collect taxes for corporate purposes subject to the rule of uniformity as to persons and property; and that the burden of taxation by special assessment could not be imposed on a locality without the consent of the taxpayers to be affected. And the court held, in respect of the act of 1871, "that neither the commissioners or the juries selected, nor the county court, is such a body as, under the constitution, may be given power to make local improvements by special assessments or by special taxation on contiguous property;" and also that "under this law, the people whose property is subject to taxation or assessments have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court."

Section 5 of article IX of the State constitution of 1848 provided: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Section 9 of article IX of the Constitution of 1870 read: "The General Assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same."

These provisions of the two constitutions are substantially identical, and while prior to the act of 1871, the clause of the Constitution of 1870 had not been construed by the Supreme Court of the State, the similar provision in the Constitution of 1848 had been construed in several instances. And it was ruled that the right of taxation could not be granted by the general assembly in any form to private persons, or to private corporations; that the provision limited the power of the general assembly to grant the right to assess and collect taxes to the corporate or local authorities of the municipalities or districts to be taxed; that a local burden of taxation or special assessment could not be imposed upon a locality without the consent of the taxpayers to be affected; and that corporate authorities were municipal officers directly elected by the people of the municipality or appointed in some mode to which they had given their assent. *Harward* v. *St. Clair Levee & Drainage Company*, 51 Ill. 130; *Hessler* v. *Drainage Commissioners*, 53 Ill. 105; *Lovingston* v. *Wider*, 53 Ill. 302; *Wider* v. *City of East St. Louis*, 55 Ill. 133; *People* v. *Salomon*, 51 Ill. 37.

The construction of the State constitution in *Harward's* case and others has been repeatedly recognized by this court as authoritatively established.

And as this was the settled law of the State when these bonds were issued, and the constitution of 1870 admitted of no other construction, we concur in the opinion that the act of 1871 was repugnant to the constitution of Illinois; the bonds due under it were void; and the lands intended to be benefited could not be specially assessed by any action taken in conformity with the provisions of that act.

The case of *Blake* v. *People*, 109 Ill. 504, conducts to no other result. That case arose under the act of May 29, 1879, which was passed after the amendment of the State constitution adopted in 1878. That amendment provided that the general assembly might pass laws permitting the owners of lands to construct drains, ditches and levees across the lands of others, and to organize drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, "and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessment upon the property benefited thereby." The new levee district was organized under this act

to repair the levee which had been built under the invalid law of 1871. The objection was raised by a land owner, on the application of the collector of the county for judgment against his land on an assessment, that the old levee had not been built under a law of the State within the meaning of the act and of the constitution, because the act of 1871 was no law. The court held that the point should have been raised before the confirmation of the assessment roll, and came too late. The court also held that it could not take judicial notice that the purpose for which the corporation was created was not to keep in repair levees theretofore constructed under a law of the State, but assuming the question to be properly before the court, that while the act of 1871 was unconstitutional as affecting those over whose lands the drains, levees, &c., were to be constructed without the owners' consent, and those against whose property it was proposed to assess the cost of constructing such drains and levees without their consent, yet that there might be some person so situated as to be precluded from raising the question of the validity of the law. And while, strictly speaking, there neither was nor could be any levee in Illinois constructed under a law of the State, yet that the legislature plainly meant to authorize the completion and repair of levees that had been constructed under an act purporting to be a law, though it was not. The court said: "There was no law in force authorizing the construction of levees over the lands of others (save the act of April 24, 1871) at the time *Updike* v. *Wright*, and *Webster* v. *Levee Commissioners*, were decided. To obviate the effect of those decisions—allow the construction of levees, as well as drains, upon the lands of others—and to authorize the formation of municipal corporations for the purpose of constructing drains and levees, the amendment to section 31, article IV, was submitted to, and adopted by, the people, at the November election, in 1878. The act of May 29, 1879, but repeats, in this respect, the language of that amendment. The levees, therefore, which must have been referred to, because none other could reasonably have been intended, were the levees which had been constructed, but could not be kept in repair because of the decisions in *Updike* v. *Wright*, and *Webster* v. *Levee Commissioners*."

The act of April 24, 1871, being invalid, the corporate existence of the levee commissioners, and the assessments made at their instance, and the collection of the latter under that act, or under the act of April 9, 1872, entitled "An act to provide for the registration of drainage and levee bonds, and secure the payment of the same," failed with it. But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the Circuit Court should have enforced the assessments exactly as if the law had been a constitutional enactment. The bill sought to collect not only the assessments already

made, but asked to have further assessments made to pay the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. We are unwilling to assent to the doctrine of legislation by estoppel. The courts cannot, by the execution of an unconstitutional law as a law, supply the want of power in the legislative department.

In *South Ottawa* v. *Perkins*, 94 U. S. 267, this court said: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

In that case the invalidity of the law grew out of the fact that the journals of the Senate and House did not show the passage of the bill as the constitution required it to be shown. Bonds had been issued, bought innocently, and the town had paid one installment of interest, but it was held that the bonds could not be sustained on the doctrine of estoppel. In this case the bonds were signed, issued and sold by the commissioners, and the interest which was paid was paid by the commissioners. The land owners had no control of the question whether bonds should be issued, and were not in privity of contract with the purchasers of the bonds. As the act, the assessments, and the bonds were void, the land owners, when it was sought to subject their property to those assessments for the payment of the void bonds, could not be estopped on the ground that the law itself, though void, was valid as to them.

Even in the instance of contracts of a corporation beyond the scope of its corporate powers, the law is well settled in this court that nothing which has been done under them or the action of the courts can infuse any vitality into them. *Central Transportation Company* v. *Pullman Company*, 139 U. S. 24.

Daniels v. *Tearney*, 102 U. S. 415, though not precisely in point, is illustrative of the distinction between enforcing an invalid law in an executory way, and awarding relief in respect of things accomplished under it. In that case, the secession convention of the State of Virginia had passed an ordinance providing that any person whose property had been taken

on execution, might, by giving a bond for the payment of the judgment, have his goods released so long as the law should remain in force. Porter recovered a judgment against Daniels in the Circuit Court of Jefferson County, and Daniels availed himself of the ordinance by filing the required bond. To a suit brought on the bond by Tearney *et al.*, executors of Porter, after the close of the civil war, the defense was made that the law under which the bond was given was unconstitutional, and so that the bond was void. There was a difference of opinion in the court as to whether the bond was good as a voluntary bond or not, but it was held that conceding the bond to have been wholly void, the judgment upon it ought not to be reversed, on the principle that where a party has availed himself for his benefit of an unconstitutional law he is estopped as between himself and others not occupying that position from setting up its unconstitutionality as a defense. The obligee of the bond sued on had not availed himself of the void ordinance, but was deprived of his rights by it. He had not in any way, expressly or impliedly, made himself a party to the illegal proceeding, or affirmatively agreed to take any advantage from it, while the consideration of the bond had been fully received by the obligor, who could not, under such circumstances, be permitted to deny a liability put upon the obligee *in invitum*.

It follows that this bill cannot be maintained on the theory of the validity of the act of 1871, even though some other equity might have been asserted if in the exercise of reasonable diligence. The result is not inconsistent with the cases that hold that although a law is found to be unconstitutional, a party who has received the full benefit under it, may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.

In the case before us, the land owners did not and could not receive the benefits which it was contemplated would accrue to them from the proceedings if they had been valid. As the Circuit Court of Appeals pointed out what the land owners, who promoted the passage of and proceeded under the act of 1871, had in view "was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority." The scheme embraced not only the construction but the maintenance of the levee and must be looked at in its entirety. "If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that the act of 1871 was valid, with equal truth it may be said the land owners would never have sought nor desired such legislation except in the belief that the levee would be maintained by the same authority

that constructed it." When the law fell, the method of maintaining it by compulsory process also failed, and if it be said that there was only a partial failure of consideration, it is plain that the consideration was indivisible and not susceptible of apportionment, while the evidence demonstrates that the losses suffered by the land owners by reason of the breaking of the levee exceeded the amount of the bonds in question.

The grounds of estoppel claimed in this case seem to be, that one or more of the defendants secured the passage of the act of 1871; that others actively participated as petitioners and otherwise in the organization of the levee district before the bonds were issued; that others who took no part whatever in any of the proceedings, after the bonds were issued and the law was held to be unconstitutional, united in an attempt to maintain and repair the levee by voluntary contributions; that others, who neither said nor did anything, knowing that the proceedings were pending and that the levee was in course of construction, remained quiescent; that others paid interest on their assessments for the years 1873 and 1874; that others participated in the organization of the new and legal levee district after the constitution of Illinois had been amended and a law passed authorizing the formation of levee districts; and that others purchased lands after the Webster case was decided, and their deeds contained certain references to the act of 1871.

We think that the evidence fails to show that Palms relied, or had the right to rely, on the acts, or assurances, or silence, of any of these different classes of land owners, and was thereby misled. He purchased the bonds, not of the land owners, or any of them, nor from the levee commissioners, but in the open market, and on the advice of counsel as to the legality of the proceedings. The land owners who participated in any way in the creation of the drainage district were as vitally interested in the matter as any purchaser of bonds could be, and they acted equally in the mistaken belief that the law was valid. "It would be a novel idea," as the Supreme Court of Illinois remarked in *Holcomb* v. *Boynton*, 151 Ill. 300, "in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all." But we need not pursue the discussion, for, in view of the invalidity of the proceedings, if complainants had a cause of action, that cause of action arose before May 4, 1878, when Palms filed his bill, yet the land owners were not proceeded against until the 22d of April, 1889.

The statute of limitations of Illinois provided that actions on unwritten contracts, express or implied, and all civil actions not otherwise provided for, should be commenced within five years next after the cause of action accrued. Courts of equity usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. In the

second aspect of their bill appellants did not rely on their bonds as legal instruments, but they sought the aid of a court of equity for the enforcement of a lien in payment of the bonds by reason of an estoppel *in pais*, and the cause of action so created would seem to have been barred by that statute. But courts of equity go farther in the promotion of justice, and where laches exist, deny the relief sought, even though the statutory period may not have run under the applicable statute.

The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief.

Palms purchased these bonds of the contractors to whom they had been delivered by the commissioners, who assumed a right to issue and make that disposition of them by virtue of the power to borrow money granted by the act of 1871. The enterprise of erecting such a barrier to the incursions of the river was, in its nature, hazardous, and the levee required not only the utmost skill in construction, but the utmost effort and vigilance in its repair and maintenance. The transaction was in its nature speculative as the value of the reclaimed lands depended on the permanency of the structure.

The enforcement of the assessments for benefits on which the payment of the cost of the work depended was resisted from the first by certain land owners, who had opposed the scheme as attempted to be authorized, and their legality was brought to the test as soon as in the orderly progress of judicial proceedings it could be done. The result was that in 1876 the act of 1871 was held void and the assessments illegal. In that same year the levee broke and the lands were devastated. In 1877 some of the land owners raised some thousands of dollars, giving trust deeds as security, for the repair of the levee, the money to be devoted to that purpose exclusively, and repairs were made.

May 4, 1878, Mr. Palms filed his bill, to which the land owners were not made parties. The principal of the first and largest assessment was payable one-tenth annually beginning with 1882, but the interest, at the rate of ten per cent per annum from October 1, 1872, was collectible annually, and the interest on the bonds was also payable yearly. The installments of interest for 1875, 1876 and 1877 had not been paid, and those succeeding remained unpaid.

In 1880 the Circuit Court entered the order permitting Palms to bring in the land owners by filing a supplemental or an original bill; and in that same year there were numerous breaks in the levee.

During the same year a new drainage district was organized under the provisions of the act of 1879, which had been passed in accordance with the constitutional amendment of 1878. Large assessments were levied upon the lands, aggregating hundreds of thousands of dollars, and the money was put into the property. In 1881 the levee broke again, but the new drainage corporation went on with its work. The levee broke again in 1888, and additional assessments were levied.

Palms did not avail himself of the order, in the original cause, of July 7, 1880. He took no further steps, and died November 24, 1886. His executors filed this bill April 22, 1889. The record affords no explanation of the delay, and it seems to us that this was such laches as forbids relief. To enforce these bonds against those by whose courage, energy and expenditure the lands have attained whatever value they now possess, would in our judgment be too inequitable to be permitted.

Mr. Palms knew of the decisions of the Supreme Court of Illinois in the Webster and Updike cases; of the breaks in the levee; of the efforts of the land owners to rebuild and maintain it by large expenditures of money; and he could not lie by until after such expenditures, and with the condition of the district and the personnel of its people constantly changing, and then insist that during all this time the parties were under a liability to him which, in equity, they were estopped to deny.

So far as part of the old levee became part of the new levee, the new drainage corporation used it because they could not do otherwise, and besides Palms, as a purchaser of bonds in the open market, was a stranger to the work. Even if the contractors could have claimed an equitable lien on the structure itself, Palms could not, and, indeed, any resort to subrogation is disclaimed by appellant's counsel. Such a claim could not have been successfully maintained under our decision in *Ætna Insurance Co.* v. *Middleport*, 124 U. S. 534. There the town of Middleport had issued certain bonds to aid in the construction of a railroad; the road was constructed and the bonds delivered to the railroad company in payment of the work, and were afterwards sold to the complainant. The Supreme Court of the State of Illinois held the bonds void, and a bill was filed in the Circuit Court of the United States to enforce their collection on the theory of subrogation to the right of the railroad company to enforce the contract evidenced by a vote of the town appropriating the amount involved to pay for the railroad, and the acceptance and fulfillment of the contract by the railroad company. But it was decided that complainant having bought the bonds as negotiable securities from the railroad company, could not be substituted to any rights which it might have had against the defendants; that no right of subrogation existed; that subrogation was applicable only in cases where a junior incumbrancer was forced to pay

off a superior lien for the protection of his rights, or in some similar case; and that a mere volunteer was not entitled to claim the right.

It is worthy of remark that the decree of the Circuit Court in that case was placed on the ground that the right of action of the railroad company, resting only in parol, was barred by the statute applicable to contracts not in writing. Blodgett, J., 31 Fed. Rep. 874.

Here no bonds were ever sold by the commissioners to Palms or any one representing him. They were delivered to the contractors and were taken in payment at ninety cents on the dollar of their face value. If the acts of any of the land owners created any equities against them it was in favor of the contractors, and these equities could not be asserted by Mr. Palms, unless by subrogation, which could not be availed of. And if it could be held that the money of Mr. Palms did enter into the construction of the levee, yet it was inextricably intermingled with that furnished by private individuals, by the new levee and drainage district, by three railroad companies, and by the United States government, the total aggregating half a million dollars, from 1877 to 1893.

In *Litchfield* v. *Ballou*, 114 U. S. 190, it was held that a creditor who had loaned to a municipal corporation, in excess of the amount of the indebtedness authorized by the constitution, money which had been used in part for the construction of public works, was not entitled to a decree in equity for the return of his money, because the municipality had parted with the specific money and it could not be identified; that a bill in equity praying for the return of specific and identical moneys borrowed by a municipal corporation from complainant in violation of law would not support a general decree that there was due from the municipality to him a sum named, which was equal to the amount borrowed; and further, that a constitutional provision forbidding the municipality from borrowing money operated equally to prevent moneys loaned to it in violation of this provision and used in the construction of a public work, from becoming a lien upon the works constructed with it.

And if in this case any ground of relief on the theory of implied contract ever existed, the want of diligence presented an insuperable bar to its assertion.

Decree affirmed.

Mr. Justice Brown did not hear the argument and took no part in the decision of this case.